93-745

No.

Supreme Court, U.S.
FILED
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IN THE

# SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1993

MITCHELL SHANDS, DON KEY and FORREST BUSCH,

*Petitioners,*

vs.

CITY OF KENNETT, and WARREN KARSTEN, JOHN MALLOTT, JERRY TALLEY, JOHN VARDELL, and JINGO COLE, Individually and in their official capacities,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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*October, 1993*

## QUESTIONS PRESENTED

1. Whether the First Amendment prohibits the discharge of volunteer firefighters for privately speaking with a city official involving substantial matters of public concern absent a showing of actual harm to an important government interest.

2. Whether a right to liberty was implicated when city official made statements to the news media during coverage of the terminations of four fire department employees that they had been discharged for "misconduct" and that "discrepancies" had been found requiring an "audit" of the department.

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL PROVISIONS INVOLVED ..... 2

STATEMENT OF CASE ..... 2

1. COURSE OF PROCEEDINGS BELOW ..... 2

2. STATEMENT OF FACTS ..... 4

REASONS FOR GRANTING THE WRIT ..... 8

I. The Eighth Circuit's decision extend -ing the "reasonable belief" standard of proof of *Connick v.Myers* to employee speech involving substantial matters of public concern conflicts with the decisions of a majority of the other circuit courts of appeal. ..... 8

II. The Eighth's Circuit's disposition of the liberty interest claim is inconsistent with the decisions of this Court ..... 13

CONCLUSION ..... 14

## TABLE OF AUTHORITIES

*American Postal Workers Union v. U.S. Postal Service*, 830 F.2d 294 (D.C. Cir. 1987) ..... 10

*Codd v. Velger*, 429 U.S. 628, (1977) ..... 13

*Conner v. Reinhard*, 847 F.2d 384 (7th Cir. 1988), *cert. denied*, 488 U.S. 856, (1988) ..... 12

*Connick v. Myers*, 461 U.S. 138, (1983) ..... 8,9,10,12

*Donahue v. Winsor Locks Board of Fire Commissioners*, 834 F.2d 54 (2nd Cir. 1987) ..... 11

*Marquez v. Turnock*, 967 F.2d. 117 (7th Cir.1992) ..... 12

*Matherne v. Wilson*, 851 F.2d 752 (5th Cir. 1988) ..... 11

*Melton v. City of Oklahoma City*, 879 F.2d 706 (10th Cir. 1989) *overruled on other grounds*, 928 F.2d 92 *en banc*, (10th Cir. 1991) ..... 11

*Owens v. City of Independence*, 445 U.S. 622, (1980) .. 13-14

*Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251 (7th Cir. 1985) ..... 12

*Roth v. Veteran's Administration*, 856 F.2d 1401 (9th Cir. 1988) ..... 11

*Waters v. Chaffin*, 684 F.2d 833 (11th 1982) ..... 12

*Zamboni v. Stamler*, 847 F.2d 73 (3rd Cir. 1988) *cert. denied* 488 U.S. 899, (1988) ..... 11

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

MITCHELL SHANDS, ET AL., PETITIONERS

*v.*

CITY OF KENNETT, ET AL., RESPONDENTS

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners Mitchell Shands, Don Key, and Forrest Busch respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., p. A2) is reported at 993 F.2d 1337. The decision of the district court (App., p. A18) is reported at 789 F. Supp. 989.

## JURISDICTION

The judgment and opinion of the court of appeals was entered on May 21, 1993. A timely motion for rehearing was denied on July 9, 1993. On September 20, 1993, Justice Blackmun extended the time for filing a petition for writ of certiorari to and including October 27, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, *inter alia,* as follows:

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment, Section 1 provides in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

## STATEMENT OF THE CASE

### 1. COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

This case arises out of the discharge of four volunteer firefighters from employment with the City of Kennett for privately speaking with a city councilman concerning city policy and matters of fire safety.

Following their discharge on April 10, 1989, Petitioners brought suit alleging their discharge impermissibly infringed on their rights of freedom of speech and petition. The also asserted that they were deprived of a liberty interest in their good names and reputations by the statements of city officials to the news media in connection with the discharges which created false and stigmatizing impressions that they were guilty of criminal acts.

At trial, the district court instructed the jury that to return a verdict for plaintiffs it must find that the private conversation with the city councilman did not unduly interfere with their ability to perform their jobs or cause any actual or potential disruption to the fire department's functions. It further

instructed the jury on the Fourteenth Amendment due process claim that it would have to find that city officials had made public statements which "suggested, implied or created the false impression that plaintiffs had taken money, manipulated figures on fire reports, slashed tires, made threatening telephone calls, or received payment from the city for services when none had been performed." The jury returned verdicts for petitioners on both counts.

The district court granted a judgment n.o.v. setting aside the jury's verdict and dismissing the case. It concluded that although the jury could have determined petitioners were discharged for statements relating to safety within the department, it was unable to find any evidence that the private statements to the councilman *did not* cause any actual or *potential* disruption to the fire department. The court of appeals found the district court had improperly submitted the question of whether the speech caused actual or potential disruption. It concluded that such a determination was a matter of law rather than one of fact and proceeded to address it for the first time on appeal.

The Eighth Circuit found no evidence the private conversation with the councilman had caused any actual harm or disruption to the efficiency of the fire department. It held that evidence of actual disruption is not required in all cases. It concluded that the potential for harm was sufficient when an employer "reasonably believes" speech has or will undermine his authority, create dissension or cause disruption of the department. It found two of the three topics addressed in petitioners' speech were matters of public concern relating to the "quality and safety of the fire department." It concluded that the third topic, although "undoubtedly related" to the safety concern, touched upon a matter of public concern in a tangential manner. As to the level of public interest, the panel found the speech was of limited public importance because the public concerns had been discussed only within the fire department rather than being the center of an ongoing public debate. It further noted that there was no evidence that the speech hindered petitioners' job responsibilities.

With respect to the liberty interest claim, the court of appeals concluded as a matter of law that the evidence failed to show either that the statements were made "in connection with" the discharge or seriously stigmatized petitioners.

## 2. STATEMENT OF FACTS.

### A. THE CONCERN WITH FIRE SAFETY.

The City of Kennett owns a municipal utility company managed and operated under state law by a separate Board of Public Works also referred to as Light, Gas & Water (LG&W). In early 1989, LG&W issued a new policy which prohibited anyone except one of its employees from disconnecting utility service, including electric meters. A copy of the policy was posted on the bulletin board in the fire department. The policy created serious problems for the public and firemen attempting to perform their firefighting duties. If the current or gas to a building needed to be turned off or disconnected, it was necessary to contact LG&W and request one of its employees be sent to the fire scene. Normally, the LG&W employee would arrive at the fire 15-20 minutes later. (Tr., p.245 lines 9-12; 567-68, lines 4-25/1-14). The length of the delay in large part depended on whether the fire was during the day or night, with the delays at night being longer. Firemen were therefore required to postpone their firefighting efforts until the LG&W employee had arrived and disconnected the utilities or risk serious injury and loss of life from a live electric current or a gas explosion. (Tr., p. 567-68; 243-244, App., p. A4). These dangers were explained to Chief Mallott and the fire department as a part of a fire training program in early March of 1989.

A vacancy for a firefighter had remained unfilled since the beginning of 1989 and an employee of LG&W had submitted an application to serve as a volunteer firefighter. Having a LG&W employee as a volunteer firefighter was an obvious solution to safety problem created the LG&W policy. Such an individual would be authorized to disconnect utilities without the necessity

of calling LG&W thereby avoiding unnecessary delays in fighting fires.

In mid-March Chief Mallott mentioned in passing to Don Key, and a day or two later to fire captain Bob Holder, that he was considering an individual to fill the vacancy. No notice of the vacancy had been posted or otherwise advertized outside the department. Individuals seeking to serve as volunteer firemen frequently kept their applications on file for years before a vacancy occurred. Key mentioned to the chief that he knew an employee of LG&W had submitted an application for a firefighter position and expressed the belief that all applications on file should be considered. The chief told Key and Holder he would schedule a meeting with them to review the applications before he made any decisions. However, he admitted at trial that he had already made up his mind but made no effort to communicate that decision to them. He left the false impression he would consider other applicants and further discuss the filling the position with them.

The city council had established a fire department committee composed three city council members whose duties it was to oversee the operations of the department. The committee also recommended individuals to the council to fill any vacancies. In the latter part of March 1989, the committee recommended David Horton to the council for the volunteer firefighter position. The city's employment policy required that a recommendation of employment must be presented to the council two weeks prior to any vote on hiring the individual.

On Saturday morning, April 1, 1989, petitioners privately met with Councilman Jingo Cole at his place of business before he opened. They explained their concerns about the department, including the safety problem created by LG&W's policy and the importance of having someone who could disconnect electric meters at a fire. They mentioned to him that an employee of LG&W had applied and asked him to support a motion at the next city council meeting scheduled for April 4th to postpone for two weeks action to fill the position. They further explained that their reason for requesting a delay was to provide time to explore the possibility of creating a second

position so that both the LG&W employee and David Horton could be hired. (Tr., p. 574-575, lines 22-25/1-5).

Petitioners denied any motivation or action on their part to undermine the chief's authority. They and fire captain Bob Holder all had impeccable employment records and had never been subject to disciplinary action by any superior including Chief Mallott. They all performed their duties well and at no time failed or refused to follow any direction or carry out any order they were given. They maintained a good working relationship with the chief and none of them had a conflict or personal employment dispute with him. Petitioner Shands, an electrical contractor himself, testified that the main reason he went with Key, Busch and Holder was the safety issue of hiring someone authorized under LG&W's policy to disconnect electric meters at fires.

At the city council meeting on April 4, 1989, Councilman Cole seconded a motion to delay for two weeks action to fill the volunteer firefighter position. The motion failed and Horton was employed by the council. Following the meeting, Chief Mallott learned that Cole had been contacted by members of the fire department and questioned him to learn the identities of the individuals who had spoken to him. The chief decided that night he would dismiss the individuals involved once he learned their names for insubordination in going behind his back. Over the next several days Mallott continued his efforts to learn the names of the individuals. Cole subsequently confirmed the names of the four firemen. Mallott met with Mayor Karsten and the fire department committee and obtained their approval to discharge petitioners. On evening of April 10, 1989 after a fire department training meeting, Mallott handed petitioners and Holder letters of dismissal. The letters stated the reasons for discharge to be insubordination and misconduct.

### B. CITY OFFICIALS' STATEMENTS TO THE PRESS.

The matter gained wide notoriety the next several days in the newspaper and on two area television news reports. The chief, mayor and chairman of the fire department committee

gave interviews the next morning to newspaper and television reporters covering the terminations. They confirmed the stated reasons for discharge. The chief was infuriated by the attention provided by the news media, and in the first of three newspaper interviews he gave, he mentioned to the reporter the likelihood that an audit would be conducted of the department. The reporter separately interviewed Mayor Karsten and fire committee chairman Talley the same morning. She asked the mayor whether any audit was expected, to which he replied: "Probably. We'll have an audit done soon--we found some discrepancies. I can't comment on that." At trial the mayor admitted that there had been absolutely no basis for the statement that discrepancies existed or for conducting an audit of the fire department. Immediately after her interview of the mayor, the reporter contacted Talley. In response to her question about an audit, he stated: "There will probably be an audit called for in the Fire Department, we definitely found some discrepancies. Nothing else will be said until the audit is completed." She also identified Talley as the "source" of the statements she used in her article on the termination that the tires on the chief's automobiles had been slashed, harassing telephone calls made to his home and threats made against the chief. He also told her Councilman Cole had been "lied to" and that "some firemen" had manipulated or intentionally misstated figures on fire reports. In the newspaper article petitioners were named along with reference to criminal acts mentioned in Talley's statements.

Mallott attributed the media attention to petitioners and told another firefighter, "*If they want publicity, I'm going to show them publicity!*" Within a week after the terminations, Mallott gave two television interviews concerning the terminations and three news paper interviews, the last two being lengthy ones taking parts of two days to complete. In the interviews he made various statements about Key and Holder. He stated firemen had claimed and collected money for fire training meetings without doing any training. In a subsequent article based on conversations with a fire department member and the city clerk, the reporter stated: "No one knows where all the money went

for out-of-town fires." Petitioners asked the mayor twice to provide them with a statement of the reasons for their discharge, and on each occasion he refused. On April 18, 1989 they attended a regular city council meeting. During the public comment section of the agenda Bob Holder objected to the insinuations about audits and missing money. He denied any wrongdoing and requested the council to publicly clear their good names of any suggestion of dishonesty or criminal acts. No city official took any action but let things stand as they appeared in the press.

## REASONS FOR GRANTING THE WRIT

### I.

**The Eighth Circuit's decision extending the "reasonable belief" standard of proof of *Connick v. Myers* to employee speech involving substantial matters of public concern conflicts with the decisions of a majority of the other Circuit Courts of Appeal.**

A majority of the circuits have adopted a standard of scrutiny in employee speech cases requiring evidence of actual harm or disruption to a governmental interest to override an employee's expressions on substantial matters of public interest. These circuits include the First, Second, Third, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits. The decision of the Eighth Circuit adopting a "reasonable belief" standard directly conflicts with decisions in those circuits. Significantly, the Eighth Circuit has acknowledged the absence of any evidence of actual harm or disruption to the fire department as the result of the private conversation between petitioners and the city councilman. Neither could it find any evidence that a close working relationship between petitioner and the chief was essential to the fulfillment of the department's mission. It further found there was no evidence that the speech hindered petitioners' ability to carry out their responsibilities. With respect to the need for harmony among co-workers, the panel was unable to find any evidence the speech created dissension or animosity

among co-workers. Petitioners all had impeccable employment records and their conversation with Councilman Cole in no way pertained to any personal grievance involving their employment.

The court held that actual or objective evidence of harm or disruption was not required, and that the chief's "reasonable belief" that the petitioners' speech was an attempt to undermine his authority or would lead to disruption in the department was sufficient to justify their dismissal.

The panel conceded that two of the three topics which were the subject of their conversation plainly addressed matters of public concern dealing with the "quality and safety of the fire department." It likewise found the third topic involving the request for a two week postponement before filling the firefighter vacancy was "undoubtedly related" to the safety concern of hiring someone authorized to disconnect electric meters at a fire. It is important to remember that firefighters are in the business of protecting property from destruction and saving lives. The effectiveness of their equipment and their general safety and welfare are of crucial importance to the society which they serve. Here the risk of serious injury or death due to the lack of a firefighter qualified to disconnect electric current or the gas supply required a delay of 15-20 minutes in firefighting operations. Within that time property may be consumed by fire or lives lost. Petitioners' speech addressed real and important issues of public concern. Likewise the needs of the fire department and the qualifications of the individual selected to meet those needs are matters of concern to each and every individual of the community.

In *Connick v. Myers*, 461 U.S. 138, 75 L.Ed. 2d 708, 103 S. Ct. 1684 (1983), this Court held the government's burden in justifying the discharge of a public employee for exercise the right of free speech varies depending on the nature of the employee's expression. The Court stated:

> When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgement is appropriate. Furthermore, we do not see the

> necessity to allow events to unfold to the extent that disruption of the office and the destruction of working relationships is manifest before taking action. (p. 152).

The Court found that out of the fourteen item questionnaire Myers circulated among co-workers only one question addressed a matter of public concern. The survey was also designed to support of her ongoing personal dispute over her transfer. Under these narrow circumstances, the Court held Connick was justified in dismissing her for actions he "reasonably believed" would disrupt the office, undermine his authority and destroy close working relationships.

The Court carefully limited its ruling to the facts of the case in stating:

> We **caution** that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern. [Emphasis Supplied] (p. 152).

The majority of the circuits have interpreted this admonition to require a higher level of scrutiny for employee speech involving more substantial matters of public concern. The different formulations are sometimes described as a "showing of actual or concrete harm," "demonstration of actual, material and substantial harm," "demonstration of serious impairment," or "showing of objective evidence of disruption."

In *American Postal Workers Union v. U.S. Postal Service*, 830 F.2d 294 (D.C. Cir. 1987), Chief Judge Wald and Judge Ruth Bader Ginsburg held that the speech of a postal employee outweighed the government's claim of confidentiality for the mail absent evidence of actual or concrete harm. In his dissenting opinion Judge Bork stated:

> Unless this decision is overruled . . . today's rulings are thus capable of doing severe damage in this circuit to . . . the government's ability to discipline employee misconduct. (p.315).

The First Circuit in *Cota v. Brasslet,* 762 F.2d 827 (1st Cir. 1985) held that evidence of the detrimental impact of an employee's speech must be objectively sufficient and that "operational efficiency objections must be real and important before they can serve as basis for discipline or discharge."(p. 845).

In *Zamboni v. Stamler,* 847 F.2d 73 (3rd Cir. 1988), *cert. denied* 488 U.S. 899, 102 L.Ed. 2d 233, 109 S.Ct. 245 (1988), the Third Circuit refused to find the potential for disruption was sufficient to outweigh a public employee's First Amendment interest in speaking out on substantial matters of public concern. The court held such cases required a showing of actual, material and substantial harm or disruption. (p.78-79). *Accord: Roth v. Veteran's Administration,* 856 F. 2d 1401, 1407 (9th Cir. 1988).

In *Melton v. City of Oklahoma City,* 879 F. 2d 706 (10th Cir. 1989) *overruled on other grounds,* 928 F.2d 920, *en banc,* (10th Cir. 1991), the Tenth Circuit rejected the potential impact of employee speech requiring instead that the city produce evidence of actual disruption of the police department's services. (p. 715-716).

The Second Circuit in *Donahue v. Winsor Locks Board of Fire Commissioners,* 834 F. 2d 54 (2nd Cir. 1987) required the public employer to demonstrate that a firefighter's speech seriously impaired the efficiency of the firehouse before it will serve as grounds for dismissal. (p. 58).

The Fifth Circuit in *Matherne v. Wilson, 851 F. 2d 752 (5th Cir. 1988)* found the sheriff offered no evidence the speech related activity of one of his investigtors had impaired working relationships with his superiors or created any debilitating strife within the office. In ruling in favor of the employee, the court noted:

> Occasionally, the state's burden to justify its action may be as light as merely proving that the employer "reasonably believed the employee's speech was likely to disrupt its operations." [citation omitted]. However, where as here, "the employee's speech more substantially involves

> matters of public concern, the burden increases to require objective evidence of disruption. [citation omitted].

The position of the Seventh Circuit is not entirely clear. In *Conner v. Reinhard,* 847 F.2d 384 (7th Cir. 1988), *cert. denied,* 488 U.S. 856, 102 L.Ed. 2d 118, 109 S.Ct. 147 (1988), the court held that where the defendants failed to provide any evidence of actual harmful effects caused by the employee's alleged insubordination, the potential for office disciplinary problems insufficient. However, in *Marquez v. Turnock,* 967 F. 2d. 117 (7th Cir. 1992), the court has more recently in dicta questioned whether evidence of actual disruption would be necessary. It observed that the standard announced in *Conner, supra.,* was inconsistent with the decision of the court in *Patkus v. Sangamon-Cass Consortium,* 769 F.2d 1251 (7th Cir. 1985) indicating the court would look at the ordinary and foreseeable effect of the conduct to determine whether it would be reasonably calculated to create division or affect discipline. (p.1178).

Along with the Eighth Circuit, the Eleventh Circuit has rejected the requirement of actual harm or disruption. In *Waters v. Chaffin,* 684 F.2d 833 (11th 1982), it expressly rejected the D.C. Circuit's actual harm standard in favor of a "reasonable likelihood" that the speech will lead to disruption. (p.839, n. 12).

The Eighth Circuit's extension of the low level "reasonable belief" standard of *Connick v. Myers* to cases involving more substantial matters of public concern represents a significant encroachment on the freedom of public employees to engage in the exchange of ideas on issues relating to social, economic, and governmental affairs. The decision in this case sharpens and makes the conflict among the circuits complete. It is certain to generate confusion in the circuits and in the district courts across the country. The lower courts therefore need guidance from this Court to bring about consistency of interpretation of its decisions. As things now stand, a particular expression of views by a public employee may constitute protected First Amendment speech in one circuit in the absence of proof of any

adverse or harmful effect while in an adjoining circuit the same speech may be proscribed and form a basis for retaliatory discharge.

## II.
## The Eighth Circuit's disposition of the liberty interest claim is inconsistent with the decisions of this Court.

The jury was instructed to return a verdict for petitioners only if it found that city officials made public statements "in connection with" their discharges and that such statements created or conveyed a false impression that petitioners had stolen money, tampered with fire reports, slashed tires, made threatening phone calls or fraudulently collected money from the city for services when none had been performed. All of these activities constitute criminal offenses under Missouri law. The jury subsequently returned its verdict for petitioners.

The evidence was ample to support the jury verdict and the Eighth Circuit does not take issue with the factual determination as to the nature of the statements. Instead, it has concluded as a matter of law that the statements were neither stigmatizing or made "in connection with" the discharges. Little insight is provided for those conclusions and they stand in apparent conflict with the decisions of this Court. The evidence showed that city officials made public statements to the news media regarding "misconduct" on the part of petitioners, the existence of "discrepancies" in the department requiring an audit, manipulating fire reports, and threats against the chief. These statements were made during interviews with the press covering the reasons for petitioners' terminations and on the very next morning after they were fired.

In *Codd v. Velger*, 429 U.S. 628, 51 L.Ed. 2d, 97 S.Ct. 882 (1977), this Court recognized that a liberty interest may be implicated whenever an employer "creates and disseminates a false and defamatory impression about the employee in connection with his termination." (429 U.S.628). In *Owens v. City of Independence*, 445 U.S. 622, 63 L.Ed.2d 673, 100 S.Ct.

1398 (1980), this Court ruled that although the stigmatizing charges there were not the cause for dismissal, they were certainly made "in the course of termination of employment." The court of appeals had likewise held that the statements impinged upon the police chief's liberty interest in his reputation and good name when city officials made public charges against him "contemporaneous and, in the eyes of the public, connected with the discharge." (p. 632-633).

## CONCLUSION

For the foregoing reason, the petition for a writ of certiorari should be granted to review the decision of the Eighth Circuit Court of Appeal and resolve the confusion among the circuits upon this important constitutional questions involving employee speech. Furthermore, this Court's attention is necessary to maintain supervision over and uniformity among the lower court in the proper interpretations of its decisions.

Respectfully submitted,

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October 1993

93-745

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# SUPREME COURT of the UNITED STATES

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MITCHELL SHANDS, DON KEY and FORREST BUSCH,

*Petitioners,*

vs.

CITY OF KENNETT, and WARREN KARSTEN, JOHN MALLOTT, JERRY TALLEY, JOHN VARDELL, and JINGO COLE, Individually and in their official capacities,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

# APPENDIX

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*October, 1993*

TABLE OF CONTENTS

APPENDIX A ..... A1
(Order denying Petition for Rehearing and Suggestions for Rehearing en banc)

APPENDIX B ..... A2
(Opinion of Eighth Circuit Court of Appeals)

APPENDIX C ..... A18
(Judgment of U.S. District Court for the Eastern District of Missouri)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1790EMCG
No. 92-1978EMCG

| | | |
|---|---|---|
| Mitchell Shands, et al., | * | |
| | * | |
| Appellants, | * | Order Denying Petition |
| v. | * | for Rehearing and |
| | * | Suggestion for Rehearing |
| City of Kennett, et al., | * | En Banc |
| | * | |
| Appellees. | * | |

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

July 9, 1993

Order Entered at the Direction of the Court:

Michael E. Gans, Clerk
U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1790

Mitchell Shands, Don Key, Forrest Busch,
Appellants,
v.

City of Kennett, Warren Karsten, John Mallott, Jerry Talley, John Vardell, Jingo Cole, individually and in their official capacities,

Appellees.

No. 92-1978

Mitchell Shands, Don Key, Forrest Busch,
Appellees,
v.

City of Kennett, Warren Karsten, John Mallott, Jerry Talley, John Vardell, Jingo Cole, individually and in their official capacities,

Appellants.

Appeals from the United States District Court for the Eastern District of Missouri.

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Submitted: December 16, 1992
Filed: May 21, 1993

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Before WOLLMAN and MORRIS SHEPPARD ARNOLD, Circuit Judges, and BATTEY,* District Judge.

WOLLMAN, Circuit Judge.

Forrest Busch, Don Key, and Mitchell Shands brought this action under 42 U.S.C. §1983 against the City of Kennett, Missouri, and several city officials: Mayor Warren Karsten, Fire Chief John Mallott, and City Councilman Jerry Talley, John Vardell, and Jingo Cole. Plaintiffs appeal from a judgment notwithstanding the verdict entered by the district court in favor of defendants. Defendants cross-appeal from the district court's denial of their motion for a new trial. We affirm the judgment notwithstanding the verdict and therefore do not address the cross-appeal.

I.

The City of Kennett, having a population of approximately 12,000, operates a volunteer fire department. At the time of the events giving rise to this lawsuit, the department was staffed by seven full-time firemen and twenty-four volunteers. It was the dismissal of plaintiffs from their positions as part-time volunteer firemen that triggered this lawsuit.

In 1988, the fire department had three officers, all volunteers: Fire Chief Bill McMahon, Assistant Fire Chief Don Key, and Captain Bob Holder. In the fall of 1988, the Kennett City Council decided to replace McMahon with a full-time fire chief. On December 6, the council hired John Mallott for the position. Mallott is a professional fireman who had previously been living in a neighboring town. The hiring of Mallott stirred up considerable controversy within the fire department. Many department members believed that the fire department did not need a full-time chief. Other members were upset because the city had hired someone from outside the city rather than someone from within the fire department.

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*The HONORABLE RICHARD H. BATTEY, United States District Judge for the District of South Dakota, sitting by designation.

When Mallott became chief in January 1989, a volunteer firefighter position was vacant. David Horton, who had served as a volunteer from 1982 to 1986, applied for the position. After speaking with Horton, Mallott informed both Key and Holder that he intended to hire Horton. On March 21, 1989, Mallott recommended to the city council that Horton be hired as a firefighter. In accordance with its procedures, the city council deferred consideration of the recommendation until its next meeting, scheduled for April 4.

Having learned that Horton had been recommended for the firefighter position, plaintiff Busch spoke to Councilman Bill Wilson on March 31, 1989. Busch asked Wilson to make a motion to table the hiring of Horton for Two weeks. According to Busch, he told Wilson that the fire department had a safety problem that would be taken care of in two weeks. According to Wilson, however, Busch did not mention any safety problem; rather, Busch said only that there had been some problems with Horton in the past. Wilson informed Busch that he would move to table the hiring but would need someone to second the motion.

The safety problem to which Busch allegedly referred concerned a new policy of City Light, Gas & Water (City Light), which had recently instructed the fire department not to disconnect electric and gas meters at fire scenes because it wanted only its employees to disconnect meters. Disconnecting the meters turns off a building's electricity and gas supply. Consequently, if a fire department officer wanted the meters disconnected from a building at a fire scene, he had to call City Light, which would then send one of its employees to disconnect them. Normally, the employee would arrive at the fire scene about fifteen minutes later. This policy created a problem for the firefighters, for they either had to postpone their firefighting until the City Light employee arrived or risk being injured by a live electric wire or a gas explosion.

On April 1, a number of the members of the fire department had breakfast at the fire station. As they were cleaning up afterwards, plaintiffs and Holder discussed some surplus firefighting equipment that Mallott had purchased since taking

command. They thought the equipment was obsolete and dangerous. The four men also discussed the problem created by City Light's new policy. To solve the problem, they believed that the fire department needed to hire a City Light employee to disconnect meters. They said that a person who was currently working for City Light had applied for a firefighter position and that they believed he should be hired. They told Cole that Busch had spoken with Councilman Wilson about making a motion to table the hiring of David Horton and asked Cole to second the motion.

At the city council meeting on April 4, Wilson moved to table the hiring of Horton, stating that there had been problems with him in the past. Cole seconded the motion. Nonetheless, the motion was defeated, and the council voted to hire Horton. Over the next few days, Mallott learned that plaintiffs and Holder had asked Councilman Cole to table the hiring of Horton. Additionally, Mallott learned from Horton that one motive behind plaintiffs' visit to Cole was the desire to undermine Mallott's authority. Plaintiff Shands had told Horton that he had spoken with Cole to show Mallott that he [Mallott] could not get everything he wanted from the council. After obtaining the approval of Mayor Karsten and the fire department committee, Mallott dismissed plaintiffs and Holder on April 10. Their dismissal letters stated that they had been discharged for acts of insubordination and misconduct. The next day seventy-five percent of the Kennett firemen walked out in protest of the discharges.

The discharges and the walkout received considerable media coverage in Kennett. Linda Redeffer, a reporter of the *Daily Dunklin Democrat*, wrote a series of articles about the fire department following the discharges. In an April 11 interview, Mallott told Redeffer that the discharges were the result of "a personnel matter that was dealt with according to city policy." In a subsequent interview, Mallott told Redeffer that the men had been "insubordinate to a standing order to city policy." Mayor Karsten and Councilman Talley, chairman of the fire department committee, also spoke with Redeffer about the discharges and the walkout. In addition to speaking with

Redeffer, Mallott told a television news reporter that the firemen had been discharged for acts of misconduct and insubordination.

On April 18, the four discharged firemen appeared at a city council meeting. Holder, acting as their spokesman, read a prepared statement, telling the council that they were not guilty of any wrongdoing. On May 4, the council held a special closed session to consider the discharges. Witnesses testified concerning the reasons for the discharges, and the dismissed fireman, with the aid of counsel, were allowed to question these witnesses and make their own statements. On May 14, the city council voted not to reinstate the four men. The council found that their attempt to interfere with the hiring of David Horton constituted a sufficient basis for their discharges. On May 17, the council released a statement to dispel rumors and misinformation concerning the discharges. The release stated that the discharged firemen had not been accused of or dismissed for any financial misdealings, illegal activities, or activities involving moral turpitude. Rather, the discharges were the result of fire department personnel matters.

Some two weeks later, plaintiffs filed this section 1983 action. In Count I, plaintiffs alleged that they had been discharged in retaliation for exercising their First Amendment right to free speech. In Count II, they alleged that defendants had deprived them of a Fourteenth Amendment liberty interest without due process of law. At the conclusion of a five-day trial, the jury returned verdicts in favor of all plaintiffs and against all defendants on both counts. Following the jury verdicts, defendants made a motion for judgment notwithstanding the verdict[1] and for a new trial. The district court denied the motion for a new trial, but granted judgment notwithstanding the verdict on both counts in favor of defendants.

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[1] Now entitled a motion for judgment as a matter of law. *See* Fed. R. Civ. P. 50(b) (as amended effective December 1, 1991).

## II.

We first consider whether the district court erred in granting defendants' motion for judgment notwithstanding the verdict on Count I, the First Amendment claim. Before addressing the specific issues raised by the First Amendment claim in this case, we outline the general framework for analyzing claims by public employees that they have been improperly discharged for exercising their right to free speech.

Whether a public employee's speech is protected by the First Amendment requires a two-step judicial inquiry. The first issue is whether the employee's speech can be "fairly characterized as constituting speech on a matter of public concern." *Connick v. Myers*, 461 U.S. 138, 146 (1983); *Bausworth v. Hazelwood Sch. Dist.*, 986 F.2d 1197, 1198 (8th Cir. 1993). If the speech addresses a matter of public concern, the court must balance the "interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1969). Both of these questions are questions of law for the court. *Connick*, 461 U.S. at 148 n.7, 150 n.10.

Any underlying factual disputes concerning whether the plaintiff's speech is protected, however, should be submitted to the jury through special interrogatories or special verdict forms. *Robert v. Van Buren Pub. Schs.*, 773 F.2d 949, 954-55 (8th Cir. 1985); *Bennis v. Gable*, 823 F.2d 723, 729 & n.6 (3d Cir. 1987). For example, the jury should decide factual questions such as the nature and substance of the plaintiff's speech activity, *Bennis*, 823 F.2d at 729, and whether the speech created disharmony in the work place, *McGee v. South Pemiscot School District R-V*, 712 F.2d 339, 342 (8th Cir. 1983). The trial court should then combine the jury's factual findings with its legal conclusions in determining whether the plaintiff's speech is protected. *Lewis v. Harrison Sch. Dist. No. 1*, 805 F.2d 310, 315 (8th Cir. 1986), *cert. denied*, 482 U.S. 905 (1987); *Roberts*, 773 F.2d at 955.

If any speech is found protected under the above analysis, the plaintiff must show that the protected speech was a

substantial, or motivating, factor in the defendant's decision to discharge him. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). If the plaintiff meets this burden, the burden then shifts to the defendant to show by a preponderance of the evidence that the plaintiff would have been discharged regardless of the protected speech activity. *Id.* These two causation questions are questions of fact for the jury. *Cox v. Dardanelle Pub. Sch. Dist.*, 790 F.2d 668, 675 (8th Cir. 1986); *Roberts*, 773 F.2d at 954.

In this case, the district court failed to follow this framework. The court did not determine as a matter of law whether any of plaintiffs' speech was protected by the First Amendment, refusing plaintiffs' request that it instruct the jury that it had determined that plaintiffs' speech addressed matters of public concern. Rejecting plaintiffs' proffered special interrogatories and verdict forms, the court instructed the jury to determine whether any of plaintiffs' alleged speech activity was protected by the First Amendment. We, of course, must address this issue as a question of law. Because it is a question of law, we may address this issue for the first time on appeal. *Roberts*, 773 F.2d at 955. As this issue comes before us in a motion for judgment notwithstanding the verdict by defendants, we consider the evidence in the light most favorable to plaintiffs. *See, e.g., K & S Partnership v. Continental Bank, N.A.*, 952 F.2d 971, 976-77 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 2993 (1992); *McGee*, 712 F.2d at 343.

**A. *Connick* Analysis**

As outlined above, the initial question in determining whether an employee's speech is protected is whether the speech addressed a matter of public concern, that is, a matter of political, social, or other concern to the community. *Connick*, 461 U.S. at 146. In making this determination, we examine the content, form, and context of the speech, as revealed by the whole record. *Id.* at 147-48.

Plaintiffs spoke to Councilman Cole about three issues: (1) Mallott's purchase of firefighting equipment, (2) the fire department's need to hire someone to disconnect meters, and

(3) the hiring of David Horton. The purchase of firefighting equipment and the department's need to hire someone to disconnect meters addressed matter of public concern; both topics implicated the quality and safety of the fire department. The purchase of firefighting equipment also implicated the manner in which the city was spending public funds.

The decision to hire David Horton, however, is not so easily characterized as a matter of public concern. Defendants argue that the decision to hire Horton was a personnel matter and therefore not a matter of public concern. Plaintiffs contend, however, that the decision to hire Horton was not purely a personnel matter because it was directly linked to and inseparable from the issue of hiring a firefighter to disconnect meters. According to plaintiffs, they wanted to postpone the hiring of Horton so that the city would hire someone authorized to disconnect meters.

Although the two issues are undoubtedly related, they are nonetheless separable. The four firemen could have informed Councilman Cole about the need to hire someone to disconnect meters without requesting that the question of hiring Horton be tabled. When they asked Cole to second the motion, they entered the realm of interfering with a government personnel decision, which is normally not a matter of public concern. *Connick*, 461 U.S. at 147. Their request to Cole, then, touched upon a matter of public concern only in a tangential, attenuated manner.

**B. *Pickering* Balance**

Having found that two components of plaintiffs' speech directly addressed matters of public concern and that one component tangentially did, we must apply the *Pickering* test to plaintiffs' speech. As stated earlier, we balance the "interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. The *Pickering* "balance requires full consideration of the government's interest in effective and efficient fulfillment of its

responsibilities to the public." *Connick*, 461 U.S. at 150. The government has a legitimate purpose in "'promot[ing] efficiency and integrity in the discharge of official duties, and to mainta[in][ing] proper discipline in the public service.'" *Id.* at 150-51 (quoting *Ex parte Curtis*, 106 U.S. 371, 373 (1882)). As Justice Powell observed,

> To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

*Id.* at 151 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).

In balancing an employee's and an employer's competing interests, we weigh six interrelated factors:

> (1) the need for harmony in the office or work place; (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or could cause the relationship to deteriorate; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties.

*Bowman v. Pulaski County Special Sch. Dist.*, 723 F.2d 640, 644 (8th Cir. 1983) (citing *Connick*, 461 U.S. at 151-54). The *Pickering* balance is flexible, and the weight to be given to any one factor depends upon the specific circumstances of each case. *Germann v. City of Kansas City*, 776 F.2d 761, 764 (8th Cir. 1985) (citing *Egger v. Phillips*, 710 F.2d 292, 319 (7th Cir.), *cert.*

*denied*, 464 U.S. 918 (1983)), *cert. denied*, 479 U.S. 813 (1986).

Applying the six *Pickering* factors to this case, we find that the balance tips in favor of defendants.

**1. The Need for Harmony in the Work Place**

Plaintiffs argue that their speech is protected under the *Pickering* balance because defendants failed to show that the speech caused actual disruption within the fire department. Evidence of actual disruption, however, is not required in all cases. *Germann*, 776 F.2d at 765. Rather, the amount of disruption that a government employer must tolerate depends on several factors in the *Pickering* calculus: the extent to which the speech addresses a matter of public concern, *Connick*, 461 U.S. at 152, the type of service the employer provides, *cf. Hughes v. Whitmer*, 714 F.2d 1407, 1419 (8th Cir. 1983), *cert.denied*, 465, U.S. 1023 (1984), and the context of the speech, *see Germann*, 776 F.2d at 765.

As a public safety organization, a fire department, like a police department, has a more significant interest than the typical government employer in regulating the speech activities of its employees in order "'to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence'" in its ability, *Hughes*, 714 F.2d at 1419 (quoting *Gasparinetti v. Kerr*, 568 F.2d 311, 315-16 (3d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978)). *Cf. Germann*, 776 F.2d at 765 (holding that a fire captain's speech was not protected). "When lives may be at stake in a fire, an *esprit de corps* is essential to the success of the joint endeavor." *Janusaitis v. Middlebury Volunteer Fire Dept.*, 607 F.2d 17, 26 (2d Cir. 1979). Whether in a large professional department or in a small volunteer one like Kennett's, firemen must follow their superiors' orders and work together harmoniously to ensure their own and the public's safety. Accordingly, Mallott's decision to discharge plaintiffs is entitled to judicial deference on two levels. *Cf. Hughes*, 714 F.2d at 1419 (stating that police departments are entitled to judicial deference). First, his determination that the four firemen's speech had caused or would cause dissension and disruption is entitled to considerable

judicial deference. Second, his response to the actual or perceived disruption--the discharge of the men--is likewise entitled to deference. *Id.*

Giving his decision due deference, we conclude that Mallott reasonable believed that the discharged firemen's speech was an attempt to undermine his authority and had led or would lead to disruption in the department. Of all the members of the fire department, plaintiffs and Holder possessed the greatest potential to undermine the chief's authority. As assistant fire chief and fire captain, respectively, Key and Holder were the only other officers in the department: Holder had been a fireman for twenty years; Busch for twenty-two years; Key for twenty-four years; and Shands for thirty years. Before going to Councilman Cole, the men never met directly with Mallott to discuss their concerns about the equipment or the need to hire someone to disconnect meters--even though Mallott had indicated to Key and Holder that he intended to hire Horton. Instead of discussing their concerns with Mallott, they circumvented the chain of command. Although plaintiffs deny that they intended to undermine him, Mallott had reason to believe otherwise. Shands told Horton that he had gone to Councilman Cole because he had wanted to show Mallott "that he [Mallott] could not have his way about every little thing." Upon receiving this information from Horton, Mallott became firmly convinced that he had a serious personnel problem and that he should discharge the four men.

**2. Whether the Government's Responsibilities Require a Close Working Relationship**

Plaintiffs argue that there was less potential for disruption in the fire department because they were not required to work closely with Mallott. They observe that, for the most part, they saw Mallott only at fires and department meetings. Although a close working relationship is an important factor in some cases, such as *Connick*, we have stated that a "'blind insistence upon the presence of an intimate working relationship gives to *Pickering* precisely that rigidity and formalistic structure that the Court . . . denied in *Connick*.'" *Germann*, 776 F.2d at 765

(quoting *Gonzales v. Benavides*, 712 F.2d 142, 148 (5th Cir. 1983)). In fact, in some cases, such as this one, the absence of a close working relationship requires that an employer be given more latitude in regulating the speech of an employee. *Id.* That is, in a volunteer fire department like Kennett's, where the fire chief does not closely supervise those under his command, personal loyalty to the chief is critical to the management structure of the fire department. *See id.* Mallott had to depend especially on Key and Holder, as his only officers, to support and implement his policies and orders.

**3. Time, Manner, and Place of the Speech**

Plaintiffs argue that their speech is entitled to a heightened level of protection because they spoke privately with Cole on their own time. In *Connick*, the Supreme Court recognized that private expression by an employee on his own time and outside the work place may bring differed factors into the *Pickering* calculus. *Id.* at 152-53 & n.13 (quoting *Givhan v. Western Line Consolidated Sch. Dist.*, 439 U.S. 410, 415 & n.4 (1979)). In *Rankin v. McPherson*, the Court stated further that a purely private conversation will rarely justify a discharge of a public employee. 483 U.S. 378, 388 n.13 (1987).

Although plaintiffs' conversation with Cole was private and on their own time, it was not like the conversation in *Rankin*, where an employee spoke privately to a co-worker. As Justice Powell recognized, the risk that a single private comment like the one in *Rankin* will disrupt the work place or lower morale is low. *Id.* at 393 (Powell, J., concurring). In *Rankin*, there was no suggestion that the employee's speech or ideas were going to reach the general public. *Id.* at 388. conversely, in the case at hand, plaintiffs asked Cole to take public action. They had to expect that a request to table the hiring of Horton would raise questions and could potentially disrupt the fire department.

**4. The Context of the Dispute**

As the Supreme Court recognized in *Connick*, the context of an employee's speech is significant. 461 U.S. at 153. The same employee speech may be protected in one context but not in

another; an employee's speech that arises from a purely academic interest is entitled to more protection than speech that arises from a personal dispute with a government employer. *Id.* When employee speech arises from a dispute with a supervisor, "additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run" the department. *Id.*

Mallott had been fire chief for only three months when plaintiffs spoke to Councilman Cole. Shortly after Mallott had been hired, the members of the fire department held a special meeting at which the firemen seriously discussed walking out. Many of the men were disgruntled because they believed a full-time chief was not needed and that McMahon should have continued as a volunteer chief. They were also upset because the council had hired someone from out of town rather than someone from within the fire department. Indeed, at Mallott's first meeting with the department, many members indicated that they were upset because the council had not consulted them about the hiring of a full-time chief. With all the public debate and controversy surrounding his hiring, Mallott "felt like a political basketball."

We find that in these circumstances Mallott's decision to discharge the four firemen should be given considerable deference. Mallott knew that his authority as head of the fire department was not firmly established, and he acted to prevent his authority from being eroded further. He need not have waited until he had lost complete command of the fire department before reacting to the plaintiffs' and Holder's disruption and dissension. *Connick*, 461 U.S. at 151.

**5. The Degree of Public Interest in the Speech**

As already discussed under the *Connick* analysis, the fire department's purchase of equipment and its need for a firefighter to disconnect meters were matters of public interest. These issues, however, were not at the center of public debate; they had been discussed only within the fire department. Accordingly, we believe that the degree of public interest in plaintiffs' speech is outweighed by other factors in this case.

**6. Whether the Speech Impeded the Plaintiffs' Ability to Perform Their Duties**

There was no evidence that the speech hindered plaintiffs' ability to perform their duties as firemen. Nevertheless, this factor is not determinative. In *Connick*, the Court found that the employee's speech was not protected under the *Pickering* balance even though the employer had failed to demonstrate that the employee's speech had impeded her ability to perform her job responsibilities. *Connick*, 461 U.S. at 151.

Finding that the *Pickering* balance favors defendants, we hold that plaintiffs' speech, under the facts of this case, was not protected by the First Amendment. Accordingly, we affirm the judgment notwithstanding the verdict for the defendants on the First Amendment claim.

**III.**

We next consider whether the district court erred in granting judgment notwithstanding the verdict on Count II, the procedural due process claim. Plaintiffs alleged in Count II that Mayor Karsten, Councilman Talley, and Mallott had made false and stigmatizing statements about them to the news media in connection with their discharge and thus implicated their Fourteenth Amendment liberty interests. They further alleged that defendants had deprived them of procedural due process by failing to provide a fair and meaningful hearing for them to publicly clear their names.

In their motion for judgment notwithstanding the verdict, defendants argued that plaintiffs had failed to show that any stigmatizing charges were made against them in connection with their discharges. Defendants also alleged that assuming, *arguendo*, that such charges had been made and had thereby implicated plaintiffs' liberty interests, defendants had nonetheless afforded plaintiffs procedural due process. The district court agreed with these arguments and granted defendants' motion.

A government employee is entitled to procedural due process in connection with being discharged from employment only when he has been deprived of a constitutionally protected

property or liberty interest. *See e.g., Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570-71 (1972). Plaintiffs alleged that they were deprived of liberty interests. To establish protected liberty interests, plaintiffs were required to establish that a city official, in connection with discharging plaintiffs, publicly made allegedly untrue charges against them that would stigmatize them so as to seriously damage their standings and associations in their community, or foreclose their freedom to take advantage of other employment opportunities. *Roth*, 408 U.S. at 573-74; *Paul v. Davis*, 424 U.S. 693, 709-10 (1976); *Bishop v. Wood*, 426 U.S. 341, 348 (1976); *Codd v. Vegler*, 429 U.S. 624, 626-28 (1977); *Hogue v. Clinton*, 791 F.2d 1318, 1321-23 (8th Cir.), *cert. denied*, 479 U.S. 1008 (1986); *Fowler v. United States*, 633 F.2d 1258, 1262 (8th Cir. 1980); *Buhr v. Buffalo Pub. Sch. Dist. No. 38*, 509 F.2d 1196, 1199 (8th Cir. 1974).

As with defendants' motion on Count I, we examine the evidence in the light most favorable to the non-moving party. According to the record, Mallott was the only city official to make public statements directly concerning plaintiffs. In an interview with Linda Redeffer on April 11, 1989, Mallott said that the reason for the dismissals "was a personnel matter that was dealt with according to city policy." Also on April 11, Mallott told a television news reporter that plaintiffs had been discharged for acts of insubordination and misconduct. In a subsequent interview with Redeffer, Mallott said that plaintiffs had been dismissed because they "were insubordinate to a standing order to city policy." He explained, however, that they "were not insubordinate to a direct order from me."

We hold that these statements did not create the level of stigma required to implicate a constitutionally protected liberty interest. An employee's liberty interest is implicated where the employer levels accusations at the employee that are so damaging as to make it difficult to impossible for the employee to escape the stigma of those charges. *Kyles v. Eastern Neb. Human Servs.*, 632 F.2d 57, 61 (8th Cir. 1980). The requisite stigma has generally been found in cases in which the employer has accused the employee of dishonesty, immorality, criminality, racism, or the like. *Green v. St. Louis Housing Authority*, 911

F.2d 65, 69 (8th Cir. 1990) (quoting *Harrison v. Bowen*, 815 F.2d 1505, 1518 (D. C. Cir. 1987)); *Robinson v. City of Montgomery City*, 809 F.2d 1355, 1356 (8th Cir. 1987); *Nathanson v. United State*, 630 F.2d 1260, 1264-65 (8th Cir. 1980) (per curiam). A charge of insubordination alone is normally insufficient to implicate a liberty interest. *See Kyles*, 632 F.2d at 61; *Nathanson*, 630 F.2d at 1264 (citing *Ventetuolo v. Burke*, 596 F.2d 476, 483 (1st Cir. 1979)). Although misconduct could conceivably include accusations serious enough to implicate a liberty interest, the general allegation of misconduct in this case does not by itself rise to the level of constitutional stigma.

Plaintiffs argue, however, that Karsten, Talley, and Mallott made additional statements to Redeffer that did not specifically mention plaintiffs by name but nevertheless implied that plaintiffs had engaged in serious misconduct. Plaintiffs argue that these statements, when combined with Mallott's statement that plaintiffs had been discharged for misconduct, were sufficient to implicate by innuendo plaintiffs' liberty interests in their good names and reputations.

In analyzing plaintiffs' claim that they were stigmatized by innuendo, we focus primarily on the evidence concerning what the city officials actually told Redeffer, not on what Redeffer wrote. What appeared in print is relevant only in that it provides some evidence as to what the city officials said to Redeffer. After carefully examining the evidence concerning the content and context of each of these additional statements made to Redeffer, we find that plaintiffs' claim fails. Plaintiffs have failed to establish that any of the statements were made in connection with their discharges or seriously stigmatized them. Accordingly, the district court did not err in granting judgment notwithstanding the verdict on the procedural due process claim.

Our holding that the district court correctly granted judgment notwithstanding the verdict on both counts makes it unnecessary for us to discuss the other issues raised by the parties.

The judgment notwithstanding the verdict is affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

| | | |
|---|---|---|
| MITCHELL SHANDS, DON KEY, and FORREST BUSCH, Plaintiffs, | ) | |
| vs. | ) | No. S 89-0088 C |
| CITY OF KENNETT, WARREN KARSTEN, JOHN MALLOTT, JERRY TALLEY, JOHN and JINGO COLE, Defendants. | ) | |

**JUDGMENT**

On April 10, 1989 plaintiffs were terminated as volunteer fire fighters for the City of Kennett, Dunklin County Missouri. On June 1, 1989, plaintiffs filed suit against all defendants requesting damages arising from the termination and for a variety of other kinds of relief. Various allegations of liability were set out in the complaint.

The case was tried to a jury and after verdicts, judgment on November 30, 1991 was entered in favor of plaintiff Mitchell Shands against defendants for actual damages in the sum of Four Thousand Five Hundred and no/100 Dollars ($4,500.00) together with punitive damages in the sum of Fifty Thousand and no/100 Dollars ($50,000.00).

Judgment was also entered in favor of plaintiff Don Key against defendants for actual damages in the sum of Seven Thousand Three Hundred and no/100 Dollars ($7,300.00) and punitive damages in the sum of Seventy-Five Thousand and no/100 Dollars ($75,000.00).

Judgment awarding actual damages in favor of Forrest Busch

against all defendants was also entered in the sum of Five Thousand and no/100 Dollars ($5,000.00) together with an additional sum of Fifty Thousand and no/100 Dollars ($50,000.00) as punitive damages.

Several matters are before the Court. The first is the request of all plaintiffs for reinstatement as fire fighters for the City of Kennett on a volunteer basis.

The second is for attorney fees, costs and other relief to which the plaintiffs may be entitled.

Defendants have requested a new trial or in the alternative for judgment notwithstanding the verdict.

After reviewing the file and the motion for a new trial, and response thereto by plaintiffs, the Court determines that there was no prejudicial error committed in the trial of the case, and accordingly, the request for a new trial should be denied.

The Court next considers the motion of all defendants for judgment notwithstanding the verdict. In considering the defendants' motion for JNOV, the Court must give great credence to the jury verdict, giving it the benefit of all reasonable inferences and taking all the evidence tending to support the verdict. In order to sustain a motion for JNOV for the defendants, all the evidence must point one way, in their favor, and it must not be susceptible to any reasonable inferences supporting the jury's verdict. *Rellergert v. Cape Girardeau County, Missouri*, 924 F.2d 794, 797 (8th Cir. 1991), *aff.* 724 F. Supp. 662 (E.D. Mo. 1989). Nonetheless, in order to sustain the verdict, it must be supported by substantial evidence and a mere scintilla is not enough. *Singer Co. v. E.I. du Pont, de Nemours and Co.*, 579 F.2d 433, 440 (8th Cir. 1978).

With this standard in mind, we review the evidence. The City of Kennett is the county seat of Dunklin County, Missouri, located in the Southern portion of the Bootheel. Although a few full-time fire fighters formed a nucleus for fire protection, most of the Kennett fire department was composed of volunteers. During the time in issue, there were seven full-time fire fighters and 24 volunteers for a total of 31. Even though the 24 volunteers were called volunteer fire fighters, they received $10.00 pay per fire call, irrespective of the seriousness

of the fire. They also received $10.00 for every training session which they attended. The volunteer fire fighters ranged from attending 60% to 95% of the fires.

There are generally 140 to 160 fire calls annually and 24 training sessions; thus, if a fire fighter answered 130 calls per year and attended 20 meetings, he would receive annually the sum of $1,500.00 remuneration from the City.

Bill McMahan was the fire chief from 1980 to the end of 1988. In 1986, in addition to the fire chief, there were two captains and in 1988, rather than two captains, there was one captain and an assistant chief.

Kennett operates under Missouri law with a mayor/council style of government, and the members of the council are elected and assigned to oversee certain committees. There was a fire committee which was in existence in 1988 and 1989. The committee was composed of three members of the council with defendant Jerry Talley being the chairman, and defendants John Vardell and Jerry Repstock being the other members. Although Repstock was originally named as a defendant, he died May 14, 1990, purportedly from causes not related to this case, and his name was removed as a party-defendant.

The fire committee generally handled all of the affairs of the fire department and their actions and recommendations usually were approved by the City Council. Some of the witnesses testified that there was an internal power struggle going on over the years between the fire fighters and the fire committee, and the City Council. Other witnesses denied this type of power struggle.

In late 1988, the fire committee, on its own, determined that the fire department needed upgrading and in order to do this, the committee felt that the department should have a professional, full-time fire chief. In October of 1988, advertisements for a chief were published and defendant John Mallott, a non-Kennett resident, was hired by the fire committee. Mallott had substantial experience as a professional firefighter and before January 1, 1989 was a full-time fire fighter for the City of Sikeston, Scott County, Missouri.

Five persons on the existing fire fighting staff had applied for

the job, as did others, and following the hiring of defendant Mallott there was substantial concern expressed among the fire fighters. The fire fighters were irritated because they were not consulted by the fire committee concerning the new organization and the method of selection of a new fire chief. There were several meetings and plaintiffs and others threatened to resign. At one time, a substantial walkout was considered but on reflection and reevaluation by plaintiffs and others, the walkout was averted.

Defendant Mallott took over his duties January 2, 1989, and reorganized the force to some extent. He appointed an assistant chief, two captains and five lieutenants, all from the existing staff. Some of the five persons on the staff who had applied for Mallott's job filled the position of captain or lieutenant.

During January, February and March of 1989, Mallott began to acquire fire-fighting equipment from surplus commodities. Apparently, the items were acquired for a reasonable sum or by gift, and some may have been used equipment. There was apparently little or no communication between Chief Mallott and the fire fighters with respect to these acquisitions. At various meetings, the fire fighters expressed concern over the Chief's practice as they felt that some of the equipment the Chief had acquired was not safe or was outmoded.

In addition, the fire fighters were concerned about the lack of an expert on the force who could be available during a fire to disconnect electric meters. Many of the men felt that an electrician or a fire fighter, trained in this type of work, should be employed, so that if electricity was ever a problem during a fire, it could be resolved by having the expert available. Apparently, there was not a great deal of conversation, if any, concerning all of these matters between the Chief and the men.

David Horton had been a volunteer fire fighter for the City of Kennett between the years 1982 and 1986. He resigned in 1986 because he was somewhat disenchanted with the department operation. After Chief Mallott was employed, Horton changed his mind and felt that he would like to be reinstated as a volunteer fire fighter. He submitted an application to Chief Mallott who indicated an interest in

reinstating Horton. Sometime in March 1989, Chief Mallott issued a formal request to the council to reinstate Horton as a volunteer fire fighter. The plaintiffs and other fire fighters became aware of Horton's application and submission to the council and discussed it at various times.

Following these discussions, plaintiff Busch met for breakfast with one of the councilmen, Bill Wilson, as they were friends. The meeting occurred at McCormick's Steak House on March 31, 1989. There is some question as to whether anyone else was present other than Busch and Wilson.

At the breakfast, Busch discussed with Wilson the application of David Horton for reinstatement. Busch testified that he told Wilson that the employment of Horton should be postponed because additional time was needed to consider various safety features such as the recent equipment purchases by the Chief and the need to have someone disconnect meters at all fires. Accordingly, Busch requested that at the council meeting Wilson move to table the application of David Horton for a limited period of time. Wilson testified that at the meeting, Busch asked him to table because they had been having problems with David Horton.

In any event, Wilson agreed to move to table Horton's application, but suggested to Busch that he should contact another councilman for the purpose of having a "second" to the motion. The next day, Saturday, April 1, 1989, many of the fire fighters met at the fire station for breakfast which they did occasionally. Perhaps 21 or 22 fire fighters were present including all plaintiffs and Bob Holder, another volunteer fire fighter. At the meeting, there was a general discussion about the acquisition of the surplus equipment and the need to have someone available to disconnect meters at fires and also the application of David Horton for reinstatement. Busch indicated that he had discussed the matter with councilman Wilson who had agreed to move to table the application of Horton when it was to be presented at the next council meeting. Considerable discussion was had as to obtaining another councilman to "second" the motion to table.

Plaintiff Key suggested that councilman Cole was his friend

and that they should contact him about "seconding" Wilson's potential motion. Busch also indicated that he was a friend of Cole and several persons decide to visit Cole to discuss the matter with him.

After breakfast on April 1, 1989, all of the plaintiffs and Bob Holder went to see Cole at his Kennett place of business. They talked with him about fire department affairs, and reiterated their concern about safety, the acquisition of the surplus equipment, the need to have someone on the force available to disconnect electric meters at a fire, and the pending application of David Horton.

Plaintiff Key told Cole that councilman Wilson had agreed to move to table the Horton application for two weeks, and indicated that they needed a "second" and asked Cole if he would "second" Wilson's anticipated motion. After some discussion, Cole refused to "second" the motion, although when the meeting was actually held, he changed his mind and did "second" the motion.

Cole testified that the plaintiffs and Holder told him that they had no complaint about David Horton and his abilities as a fire fighter, but they simply wanted Chief Mallott to know he could not always get his way. They felt that tabling the motion of Horton would show this to the Chief. Plaintiffs denied the motivation portion of Cole's testimony, but did state that they had no complaint with David Horton and his abilities.

The council met April 4, 1989 and councilman Wilson did move to table the application for reinstatement of David Horton as a fire fighter. Cole seconded the motion and both voted in favor of the motion, but all other council members voted against the motion to table, and the motion was defeated. Thereafter, the application was voted on and the council voted to reinstate David Horton as a fire fighter. Following the meeting, Wilson told Chief Mallott of the discussion between Busch and himself, the fire fighters meeting of April 1st and the meeting of plaintiffs and Holder with Cole.

After the council meeting of April 4, 1989, there was some publicity about Horton's reinstatement. David Horton and his brother, Bob, by happenstance, met in Bill's Barbeque Shop in

Kennett and discussed the publicity. David understood that the publicity was from the newspaper, and Bob Horton understood that it was a radio broadcast. In each situation, the report was that the reinstatement of David created some controversy at the council meeting because David Horton was reported to be a trouble maker. Plaintiff Shands was also in the restaurant and overheard the conversation and then participated in it. David told Shands that he was concerned because he felt his former fire fighter colleagues did not want him. Shands assured both Hortons that the motion to table, and the discussion at the council meeting was not personally lodged against David, but was to show Chief Mallott that he could not always get his way before the council. At a subsequent fairness hearing, plaintiff Shands was asked about the conversation with the two Hortons, and he said that "if those boys say that's what I said, I guess I did."

After further investigation into the matter following the council meeting of April 4, 1989, Chief Mallott felt that it was necessary to terminate the plaintiffs and Bob Holder. He approached the members of the fire committee and was only able to reach Talley and Repstock as Vardell could not be located. Mallott indicated to Talley and Repstock that the plaintiffs and Holder had gone behind his back and were disrupting the operation of the department. Talley and Repstock agreed with Chief Mallott and as two of the three members of the committee could decide this matter, it was decided to follow the recommendation of the Chief in the absence of the third member, Vardell.

In the interim, Chief Mallott had also discussed the matter with Mayor Karsten on May 9th. The mayor told the chief that he would consent to terminating the plaintiffs and Holder from their jobs as volunteer fire fighters provided that the fire committee consented.

After obtaining the approval of the Mayor and two of the three members of the fire committee, Chief Mallott issued written notifications of termination to the plaintiffs and to Bob Holder on April 10, 1989. The reasons given for the terminations were "misconduct and insubordination."

Thereafter, the terminations and events leading up to them were aired on radio, television and in the newspaper. At 7:00 a.m., April 11, 1989, plaintiff Busch was in a Kennett cafe having breakfast and showed his termination letter to Jeff Wheeler, manager of the local radio station. Wheeler had a talk radio show and shortly after this reported what had happened on his show. In the radio show, he did not report that he had received this information direct from plaintiff Busch. The matter was also presented on a nearby television news broadcast in Paragould, Arkansas and numerous articles were written in the Kennett *Daily Dunklin Democrat*. It was even reported in a news story on KFVS-TV in Cape Girardeau.

Linda Redeffer, a reporter for the newspaper, spoke with plaintiff Busch about the problem and he told her he was fired for insubordination. Defendant Talley and Karsten told her they were concerned about an audit of the Fire Department suggesting the possibility of an impropriety, and Talley indicated that he had received threatening phone calls such as someone indicating they would slash his tires.

Chief Mallott told her that the reason for the termination was "insubordination to a standing city policy."

Plaintiff Shands told her he was going to run Chief Mallott out to town, like he did the former city manager.

All of the plaintiffs in their testimony stated that they had no animosity to Chief Mallott, and that they felt they got along with him quite well before their termination. Some witnesses testified that the relationship between Chief Mallott and the fire fighters was good. Others testified that it was hostile throughout the three months and 10 days he was chief before the terminations.

Irrespective of plaintiff Shands' testimony that he had no animosity to the chief, he admitted that he had stated he would spend $10,000.00 to get even and get Chief Mallott fired.

The entire affair created a considerable amount of furor in Kennett. The City Council, either at the request of plaintiffs or on its own, convened a town hall type of meeting on April 18, 1989 for the purpose of allowing plaintiffs and any one else to express an opinion about the layoffs.

All of the plaintiffs and Bob Holder attended that meeting together with their counsel, Jim R. Bruce.

Bob Holder read a prepared statement wherein he objected to his termination and that of the plaintiffs. All of the members of the council were present as was Chief Mallott and the Mayor. As the main spokesman, Holder testified that he felt he and the plaintiffs had the opportunity at this meeting to tell their story. There was a substantial crowd of townspeople at the meeting, and it was covered by radio, television and press. The Mayor announced that anyone who wanted to talk could do so, and there would be no time limits. Attorney Bruce and the plaintiffs were allowed to question anyone who made a statement and they did.

Either shortly before or after this town meeting, plaintiffs and Holder felt that they should disseminate their point of view and they bought a newspaper ad in the *Daily Dunklin Democrat* setting out their position. At some point during these proceedings, Holder told the newspaper reporter, Redeffer, that he felt Chief Mallott was on an ego trip. Chief Mallott was also interviewed on television, and there presented his point of view.

Thereafter, request was made to reinstate the plaintiffs and Bob Holder, and this was considered at a regular council meeting on May 4, 1989. This evolved into a meeting similar to the one on April 18, 1989, except that it was a partially closed session. Only the councilmen were present as was Chief Mallott and all of the plaintiffs, Holder and counsel Bruce. Again, the parties talked before the council and attorney Bruce was allowed to ask questions of anyone who talked and everyone apparently was able to have input as to their feelings concerning the terminations and potential reinstatements. At a later meeting on May 16th, in closed session, the council elected not to reinstate the plaintiffs and Holder.

No one complained at the April 18th or the May 4th meeting that they were not allowed to talk or ask questions, nor did anyone complain about the methodology of conducting both meetings.

The case was submitted to the jury on two theories. The first was that the defendants violated plaintiffs' first amendment

rights by discharging them because they exercised their rights of freedom of speech, association and petition. The second theory was a breach of plaintiffs' fourteenth amendment rights wherein a public employee is discharged and the employer makes false and stigmatizing charges against the employee in connection with the discharge. Under these circumstances, the employee is entitled to have a "name clearing hearing" in order to afford him due process. The jury found for the plaintiffs and against the defendants on both theories of recovery and awarded actual and punitive damages.

With respect to the fourteenth amendment claim, the Court instructed the jury as follows:

> Your verdict must be for the plaintiffs on their Fourteenth Amendment due process claim if you believe:
>
> FIRST, that plaintiffs were discharged from the employment with the City of Kennett;
>
> SECOND, that city officials, including defendants Talley, Karsten or Mallott, made statements which in the eyes of the public suggested, implied or created the false impression that plaintiffs had taken money, manipulated figures on fire reports, slashed tires, made threatening telephone calls or received payment from the city for services when none had been performed;
>
> THIRD, that such statements were made in connection with plaintiffs' discharge from employment with the City of Kennett;
>
> FOURTH, that plaintiffs requested a hearing to clear their names;
>
> FIFTH, that defendants City of Kennett, and defendants Karsten, Cole, Vardell and Mallott

> failed to provide plaintiffs a public hearing and a meaningful opportunity to confront the evidence against them and to clear their names;
>
> SIXTH, plaintiffs suffered damages as a result of the denial.

The Court also instructed the jury that due process is required when a public employee is discharged and the employer publicly makes a false and stigmatizing charges against the employee in connection with the discharge. The Court told the jury further that the term "stigmatizing" means "that which seriously damages one's standing and associations in the community or which substantially forecloses other opportunity of employment."

There was extensive media coverage of the incidents surrounding the layoffs. Certain conclusionary comments by members of the media derogatory to the plaintiffs were asserted by plaintiffs to come directly from defendants. Defendants, on the other hand, claimed such comments were not made by them, but were statements by the reporters and journalists themselves.

There is further substantial difference of opinion as to whether or not statements or charges made seriously damaged any of the plaintiffs' standing or associations in the community or substantially foreclosed other opportunity for employment. This is a voluntary fire department and there was little or no evidence to show that what was done prevented any of the plaintiffs from having other opportunity for employment. Plaintiff Busch lives five miles north of Kennett and has been in the area for 25 to 30 years. He is in the insurance and real estate business and does some home construction work. There was no testimony to suggest that any of his businesses had suffered as a result of the incidents in question.

Plaintiff Shands worked for Arkansas-Missouri Power and Light Company for 32 years as a foreman, and has retired from that job and now has a local electric business. There is nothing to show that his current business has suffered as a result of the incident. Plaintiff Don Key has been a Kennett resident for 40

years. He has owned and operated Don's Supply Shop for 28 years. Again, there is nothing in the evidence to show that his business has suffered because of the termination.

The Court finds therefore that it could determine as a matter of law that there is no substantial evidence upon which the jury could have determined that the plaintiffs have been stigmatized by the events that happened. There is no evidence to show that they suffered economic damage or lost any opportunity for employment.

Nonetheless, more importantly, even if the Court were to determine that plaintiffs were entitled to due process hearings because of their discharge, as a matter of law the due process was, in fact, afforded all plaintiffs.

The Court's verdict director instruction told the jury that one of the elements that they must find in favor of the plaintiffs in order to return a verdict for plaintiffs on their fourteenth amendment claim was:

> Defendants City of Kennett and defendants Karsten, Cole, Vardell and Mallott failed to provide plaintiffs a public hearing and a meaningful opportunity to confront the evidence against them and to clear their names.

Generally, the parties do not dispute the proposition that if a person's name, reputation, honor or integrity is at stake because of what a governmental entity may be doing to that person, notice and an opportunity to be heard are essential. Due process would accord an opportunity to refute any charges made. The purpose of such due process which is notice and hearing is to provide the person an opportunity to clear his name. *Board of Regnets v. Roth*, 408 U.S. 564, 573, 33 L.Ed. 2d 548, 92 S.Ct. 2701 (1972). The parties disagree that the defendants afforded plaintiffs a public hearing and a meaningful opportunity to confront the evidence against them and to clear their names.

Plaintiffs suggest that they were entitled to notice and a meaningful opportunity to respond to the charges and then for

the issue to be decided by an impartial decision-maker. In support of this proposition, the plaintiffs first cite *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 84 L.Ed.2d 494, 105 S.Ct. 1487 (1985). This case is not precisely on point as it determines what type of due process is required in a pre-termination situation. Nonetheless, there are some comments made in *Cleveland* which are pertinent in connection with any kind of due process availability. In *Cleveland*, the court suggests that there be notice and opportunity for hearing appropriate to the nature of the case. *Id.* at 542. "The essential requirements of due process and all that respondents seek or the Court of Appeals requires are notice and an opportunity to respond." *Id.* at 546.

Plaintiffs also cite as support for their position *Brady v. Gebbie*, 859 F.2d 1543 (9th Cir. 1988). The *Brady* case did, in fact, address the fundamental need for due process when a liberty interest is involved. When a person has been deprived of a liberty interest without due process, the hearing required must provide the aggrieved party with an opportunity to clear his name. *Brady v. Gebbie*, at 1554.

Where a property interest is involved, something additional is ordinarily required such as an impartial decision-maker. The present case does not involve a property interest. *Robinson v. City of Montgomery City*, 809 F.2d 1355, 1356 (8th Cir. 1987) *aff.* 651 F. Supp. 493 (E.D.Mo. 1986); *Armer v. City of Salem*, 861 F.2d 514 (8th Cir. 1988).

Thus, considering all of the favorable evidence to plaintiffs in this case, could the jury have found that the plaintiffs were deprived of an opportunity to clear their names? I believe not.

One week after discharge, the plaintiffs were entitled to be present at a public meeting at which the Mayor, City Council and the City Attorney were present. Plaintiffs' counsel was also present as was the press and numerous interested local citizens. The Mayor allowed anyone to comment that desired to do so, and he placed no time restriction on the comments.

The Mayor first allowed Bob Holder to make a prepared statement on behalf of himself and the plaintiffs. This statement was elaborate and carefully worked out, and set out all of the

concerns of the plaintiffs and Holder. It attempted to refute any impropriety or wrongdoing or inappropriate conduct on the part of the plaintiffs.

Other plaintiffs made oral presentations, and various members of the council and interested citizens made presentations. After each presentation the Mayor allowed attorney Bruce to question that person concerning his or her statement. All in all, there was a complete disclosure by all parties as to what had happened, albeit some of the statements may not have been satisfactory to the parties involved. The Court concludes, therefore, that this meeting in and of itself satisfied due process requirements where all alleged liberty interest had been lost as had been asserted here. The parties had ample time to prepare, everyone was present, and the parties and counsel had a full opportunity to participate.

That hearing was bolstered by still another hearing on May 4, 1989 at a closed session of the council. Although the session was closed, plaintiffs and their attorney were present, and again, all of the interested parties had an opportunity to express their views about the events in question and plaintiffs and their counsel again, were allowed to participate fully, and allowed to make whatever statements they desired. Plaintiffs, therefore, had every opportunity to clear their names which is all that is required to meet their due process rights. Judgment notwithstanding the verdict shall therefore be entered in favor of defendants on the fourteenth amendment claim.

The Court's verdict director instruction on plaintiffs' first amendment claim was as follows:

> Your verdict must be for the plaintiffs on their first amendment freedom of speech and petition claim if you believe:
>
> 1. The plaintiffs exercised their first amendment right of freedom of speech and petition by speaking on matters relating to the fire department;
>
> 2. The exercise of their first amendment rights

of freedom of speech was a substantial or motivating factor in the decision of the defendants to discharge plaintiffs from employment or their refusal to reinstate plaintiffs following their discharge;

3. The private statements to Councilman Cole did not unduly interfere with the plaintiffs' ability to perform their duties in the fire department or cause any actual or potential disruption to the fire department in the performance of its functions;

4. Plaintiffs suffered damages as a result of the denial of their first amendment rights.

5. That defendants would not have dismissed or refused to reinstate plaintiffs except for the fact that they had exercised their first amendment rights.

Although the substantial testimony in the case is that the plaintiffs and Bob Holder were terminated because they opposed some of the policies of the Chief and attempted to manipulate the City Council to postpone the Chief's decision to employ David Horton, it is conceivable that the jury could have inferred that the plaintiffs were terminated because of their exercise of speaking rights. The jury conceivably could have determined that plaintiffs were terminated because of various statements made about their safety concerns, the purported inadequacy of the surplus equipment the Chief was buying and the lack of attention to employing an electrician-type fire fighter. The Court, however, cannot find evidence even when considered in the light most favorable to plaintiffs that "the private statements to Councilman Cole did not unduly interfere with the plaintiffs' ability to perform their duties in the fire department or cause any actual or potential disruptions to the fire department in the performances of its functions."

The meeting with Cole undermined the entire operation of the fire department. It indicated a complete lack of regard for rank on behalf of the plaintiffs, and suggested that they would proceed at any cost to have their way. They did just that and attempted to manipulate Chief Mallott's bosses, that is, the City Council, by making arrangements with friends of the fire fighters on the council to delay proposals advanced by Chief Mallott.

Chief Mallott was the Chief. Although he may not have had a proper rapport with his men, and some of his methods might not have been acceptable to all, he was still the Chief. His authority should not be subject to question unless he was violating the law or not following a policy of the city or was himself acting in such a devious way that would disrupt the activities of the department and make the department unmanageable. Was the Chief to run the fire department as governed by the council and the fire committee, or were the plaintiffs and some of the men running the department?

The verdict director instruction was tendered by the plaintiffs and generally submits the law properly in cases of this nature. A public employee certainly has the right of free speech at all times, however, it is not without some restraints. *Pickering v. Board of Education of Township High School*, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968). There is simply no evidence in plaintiffs' favor to suggest anything else that the purpose of the meeting with Cole and others was to undermine and challenge the Chief's authority.

In addition, the evidence shows as a matter of law that defendants had the right to terminate plaintiffs. The limited First Amendment interest of plaintiffs did not require that defendants tolerate action which defendants reasonably believed would disrupt the office of the Fire Chief, undermine his authority, and destroy close working relationships between the Chief and his men. *Connick v. Myers*, 461 U.S. 138, 75 L.Ed.2d 708, 103 S.Ct. 1684 (1983). Judgment notwithstanding the verdict, therefore, should also be entered in favor of the defendants on plaintiffs' first amendment claim.

Although it is unnecessary in view of the foregoing holdings to consider the question of damages, the Court notes that there

was simply no evidence to support a submission of a punitive claim against defendants.

**JUDGMENT IS THEREFORE ENTERED** in favor of all defendants and against plaintiffs on all their claims, notwithstanding the verdict reached by the jury.

**IT IS FURTHER ORDERED** that all other motions in this case not heretofore ruled on are determined to be moot in light of this judgment.

Dated this 19th day of March, 1992.

Supreme Court, U.S.
FILED
DEC 17 1993
OFFICE OF THE CLERK

(3)

No. 93-745

In The

# Supreme Court of the United States

October Term, 1993

MITCHELL SHANDS, DON KEY AND FORREST BUSCH,

*Petitioners,*

vs.

CITY OF KENNETT, AND WARREN KARSTEN, JOHN MALLOTT, JERRY TALLEY, JOHN VARDELL, AND JINGO COLE, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION

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## COUNTER STATEMENT OF THE QUESTION PRESENTED

1. Whether the Eighth Circuit Court of Appeals followed the substantive law established in *Connick v. Myers*, 461 U.S. 138 (1983) and *Pickering v. Board of Education of Township High School*, 391 U.S. 563 (1968), in sustaining the judgment in favor of Respondents on Petitioners' First Amendment Claim on that basis that a showing of actual disruption within a fire department is not necessary when the speech by the public employee does not involve a high degree of public interest, where the fire chief reasonably believed the speech was an attempt to undermine his authority and had led or would lead to disruption within the department and where personal loyalty to the chief is critical to the management structure of the fire department.

2. Whether the Eighth Circuit Court of Appeals followed the substantive law in affirming the judgment in favor of Respondents on Petitioners Fourteenth Amendment due process claim where the statements actually made by Respondents were not made in connection with Petitioners discharge or did not seriously stigmatize Petitioners and where a name clearing hearing was provided to Petitioners and Petitioners names were cleared.

TABLE OF CONTENTS

Page

Counter Statement of the Question Presented ..... i

Table of Contents..... ii

Table of Authorities ..... iv

Counter Statement of the Case..... 1

Summary of Facts ..... 1

Clarification or Distinction of Other Facts..... 7

Argument: Reasons for Denying the Writ ..... 11

I. THE PETITION RAISES NO SPECIAL OR IMPORTANT QUESTIONS, AND NO EXTREME DEPARTURES FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS THAT REQUIRE THIS COURTS INTERVENTION ..... 11

II. THE COURT OF APPEALS' DECISION AS TO PETITIONER'S FIRST AMENDED CLAIM IS NOT IN CONFLICT WITH THE DECISIONS OF A MAJORITY OF THE OTHER CIRCUIT COURTS OF APPEALS IN THAT THE COURT OF APPEALS, IN VIEWING ALL MATERIAL FACTS IN A LIGHT MOST FAVORABLE TO PETITIONERS, AND THEN APPLYING THE *PICKERING* BALANCING TEST TO THOSE FACTS, FOUND THAT PETITIONERS SPEECH WAS NOT PROTECTED BECAUSE IT DID NOT INVOLVE A HIGH DEGREE OF PUBLIC INTEREST, THAT THE FIRE CHIEF REASONABLY BELIEVED THAT THE SPEECH WAS AN ATTEMPT TO UNDERMINE HIS AUTHORITY AND HAD LED OR WOULD LEAD TO DISRUPTION WITHIN THE DEPARTMENT AND THAT, IN THIS SITUATION, PERSONAL LOYALTY TO THE CHIEF WAS CRITICAL TO THE MANAGEMENT STRUCTURE OF THE FIRE DEPARTMENT..... 12

TABLE OF CONTENTS – Continued

Page

III. THE COURT OF APPEALS DID NOT ERR IN FINDING AGAINST PETITIONERS ON THEIR FOURTEENTH AMENDMENT DUE PROCESS CLAIM IN THAT THE STATEMENTS MADE BY RESPONDENTS TO THE PRESS WERE NOT MADE IN CONNECTION WITH RESPONDENTS DISCHARGE AND DID NOT SERIOUSLY STIGMATIZE THEM AND WHERE A NAME CLEARING HEARING WAS PROVIDED PETITIONERS AND PETITIONERS' NAMES WERE CLEARED ..... 18

Conclusion ..... 20

# TABLE OF AUTHORITIES

Page

CASES

*Bishop v. Wood*, 426 U.S. 341 (1976) ..... 19

*Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) ..... 19

*Bowman v. Pulaski County Special School District*, 723 F.2d 640 (8th Cir. 1983) ..... 14

*Brasslett v. Cota*, 761 F.2d 827 (1st Cir. 1985) ..... 14

*Codd v. Vegler*, 429 U.S. 624 (1977) ..... 19

*Connick v. Myers*, 461 U.S. 138 (1983) ...7, 13, 14, 15, 16

*Egger v. Phillips*, 710 F.2d 292 (7th Cir.), *cert. denied*, 464 U.S. 918 (1983), *cert. denied*, 749 U.S. 813 (1986) ..... 14

*Gasparinetti v. Kerr*, 568 F.2d 311 (3rd Cir. 1977), *cert. denied*, 436 U.S. 903 (1978) ..... 15

*Germann v. City of Kansas City*, 776 F.2d 761 (8th Cir. 1985) .....14, 15

*Hughes v. Whitmer*, 714 F.2d 419 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984) ..... 15

*Janusaitis v. Middleberry Volunteer Fire Department*, 607 F.2d 17 (2nd Cir. 1979) ..... 15

*McBee v. Jim Hogg County*, 730 F.2d 1009 (5th Cir. 1984) ..... 14

*Paul v. Davis*, 424 U.S. 693 (1976) ..... 19

*Pickering v. Board of Education*, 391 U.S. 563 (1968) ..*passim*

*Porter v. Califano*, 592 F.2d 770 (5th Cir. 1979) ..... 16

No. 93-745

In The

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October Term, 1993

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vs.

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*Respondents.*

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

## BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION

*May it Please the Court:*

## COUNTER STATEMENT OF THE CASE

### Summary of Facts

Although Petitioners have set forth their view of the case, the Statement of Facts presented by Petitioners is blatantly one-sided and could cause this Court to be misled as to the facts of this case. The United States Court

of Appeals for the Eighth Circuit in viewing the facts in a light most favorable to Petitioner, objectively found the facts to be as follows:

> The City of Kennett, having a population of approximately 12,000 operates a volunteer fire department. At the time of the events giving rise to this lawsuit, the department was staffed by seven full-time firemen and twenty-four volunteers. It was the dismissal of plaintiffs from their positions as part-time volunteer firemen that triggered this lawsuit.
>
> In 1988, the fire department had three officers, all volunteers: Fire Chief Bill McMahon, Assistant Fire Chief Don Key, and Captain Bob Holder. In the fall of 1988, the Kennett City Council decided to replace McMahon with a full-time fire chief. On December 6, the council hired John Mallott for the position. Mallott is a professional fireman who had previously been living in a neighboring town. The hiring of Mallott stirred up considerable controversy within the fire department. Many department members believed that the fire department did not need a full-time chief. Other members were upset because the city had hired someone from outside the city rather than someone from within the fire department.
>
> When Mallott became chief in January 1989, a volunteer firefighter position was vacant. David Horton, who had served as a volunteer from 1982 to 1986, applied for the position. After speaking with Horton, Mallott informed both Key and Holder that he intended to hire Horton. On March 21, 1989, Mallott recommended to the city council that Horton be hired as a firefighter.

In accordance with its procedures, the city council deferred consideration of the recommendation until its next meeting, scheduled for April 4.

Having learned that Horton had been recommend~~ed for~~ the firefighter position, plaintiff Busch spoke to Councilman Bill Wilson on March 31, 1989. Busch asked Wilson to make a motion to table the hiring of Horton for two weeks. According to Busch, he told Wilson that the fire department had a safety problem that would be taken care of in two weeks. According to Wilson, however, Busch did not mention any safety problem; rather, Busch said only that there had been some problems with Horton in the past. Wilson informed Busch that he would move to table the hiring but would need someone to second the motion.

The safety problem to which Busch allegedly referred concerned a new policy of City Light, Gas & Water (City Light), which had recently instructed the fire department not to disconnect electric and gas meters at fire scenes because it wanted only its employees to disconnect meters. Disconnecting the meters turns off a building's electricity and gas supply. Consequently, if a fire department officer wanted the meters disconnected from a building at a fire scene, he had to call City Light, which would then send one of its employees to disconnect them. Normally, the employee would arrive at the fire scene about fifteen minutes later. This policy created a problem for the firefighters, for they either had to postpone their firefighting until the City Light employee arrived or risk

being injured by a live electric wire or a gas explosion.

On April 1, a number of the members of the fire department had breakfast at the fire station. As they were cleaning up afterwards, plaintiffs and Holder discussed some surplus firefighting equipment that Mallott had purchased since taking command. They thought the equipment was obsolete and dangerous. The four men also discussed the problem created by City Light's new policy. To solve the problem, they believed that the fire department needed to hire a City Light employee to disconnect meters. Busch informed the others that he had talked to Councilman Wilson about tabling the hiring of David Horton. He said that Wilson had agreed to make the motion but needed someone to second it. Key said that Councilman Cole might agree to second the motion.

Plaintiffs and Holder then went to see Cole at his place of business. They first told Cole that Mallott had purchased some equipment that they thought was unsafe. They also informed Cole about the fire department's need to hire someone authorized to disconnect the meters. They said that a person who was currently working for City Light had applied for a firefighter position and that they believed he should be hired. They told Cole that Busch had spoken with Councilman Wilson about making a motion to table the hiring of David Horton and asked Cole to second the motion.

At the city council meeting on April 4, Wilson moved to table the hiring of Horton, stating that there had been problems with him

in the past. Cole seconded the motion. Nonetheless, the motion was defeated, and the council voted to hire Horton. Over the next few days, Mallott learned that plaintiffs and Holder had asked Councilman Cole to table the hiring of Horton. Additionally, Mallott learned from Horton that one motive behind plaintiffs' visit to Cole was the desire to undermine Mallott's authority. Plaintiff Shands had told Horton that he had spoken with Cole to show Mallott that he (Mallott) could not get everything he wanted from the council. After obtaining the approval of Mayor Karsten and the fire department committee, Mallott dismissed plaintiffs and Holder on April 10. Their dismissal letters stated that they had been discharged for acts of insubordination and misconduct. The next day seventy-five percent of the Kennett firemen walked out in protest of the discharges.

The discharge and the walkout received considerable media coverage in Kennett. Linda Redeffer, a reporter for the *Daily Dunklin Democrat*, wrote a series of articles about the fire department following the discharges. In an April 11 interview, Mallott told Redeffer that the discharge were the result of "a personnel matter that was dealt with according to city policy." Mayor Karsten and Councilman Talley, chairman of the fire department committee, also spoke with Redeffer about the discharges and the walkout. In addition to speaking with Redeffer, Mallott told a television news reporter that the firemen had been discharged for acts of misconduct and insubordination.

> On April 18, the four discharged firemen appeared at a city council meeting. Holder, acting as their spokesman, read a prepared statement, telling the council that they were not guilty of any wrongdoing. On May 4, the council held a special closed session to consider the discharges. Witnesses testified concerning the reasons for the discharges, and the dismissed firemen, with the aid of counsel, were allowed to question these witnesses and make their own statements. On May 14, the city council voted not to reinstate the four men. The council found that their attempt to interfere with the hiring of David Horton constituted a sufficient basis for their discharges. On May 17, the council released a statement to dispel rumors and misinformation concerning the discharges. The release stated that the discharged firemen had not been accused of or dismissed for any financial misdealings, illegal activities, or activities involving moral turpitude. Rather, the discharges were the result of fire department personnel matters.

*Shands v. City of Kennett*, 993 F.2d 1337 at 1340-1342 (8th Cir. 1993), Appendix to Petition, A-3 through A-6.

Respondents believe the proof raises no factual issues material to *certiorari* even upon full briefing as both the District Court and 8th Circuit viewed the facts in a light most favorable to Petitioner. However, mindful of the obligation imposed by Rule 15.1, this response will point out some of the erroneous and misleading statements of fact contained in the petition including the following:

**Clarification or Distinction of Other Facts**

In the Statement of the Case Petitioners state that the Eighth Circuit found the speech relating to the tabling of the hiring of David Horton was "although 'undoubtedly related" to the safety concern, touched upon a matter of public concern in a tangential manner." (Petition, p. 3) This statement is typical of petitioner misleading paraphrasing of the Court's decision. The "finding" about which petitioners refer is contained in the Court's discussion of the *Connick v. Myers*, 461 U.S. 138 (1983) analysis of whether the speech was of public concern and is contained in the first two paragraphs of Page A-9 of the Appendix. As stated there, the Court said that petitioners request of Cole to second the motion to table the hiring of David Horton "entered the realm of interfering with a government personnel decision, which is normally not a matter of public concern." (Appendix A-9). Although the Court did determine that two components of petitioners speech directly addressed matters of public concern which caused application of the *Pickering* balancing test, petitioners statement needs to be clarified because the interference with the personnel decision and the petitioners attempt to undermine the authority of the fire chief by doing so were important in the Court's application of the *Pickering* balancing test.

Petitioners also stated that the Light, Gas and Water (LG&W) policy prohibiting non-employees from pulling meters created "serious" problems for the public and firemen. The Eighth Circuit finding was that the policy created a problem for the firemen. The "serious" and "public" are petitioners' editorial addition to the Court's opinion.

In one of the few statements of fact in which petitioners actually cite the Court to a portion of the transcript or opinion to support this statement, a view of the cited portion of the transcript does not support petitioners characterization of the statement. Petitioners brief states that petitioners explained the reason for requesting the delay in the hiring of Horton was to provide time to explore the possibility of creating a second position so that both the LG&W employee and David Horton could be hired. (Petition, p. 5-6) The portion of the transcript cited does not support that statement. The transcript cited states:

> Q. Did anyone explain to Councilman Cole why he was being asked to second the motion?
>
> A. To the best of my knowledge, they did.
>
> Q. Okay. And what is your recollection of the reason they wanted to postpone the hiring of David Horton?
>
> A. I believe he told him the same that I have stated here today, that he would like to have it seconded and postponed for two weeks in order to try to get another employee to pull light meters. (TR p. 574, 1, 22-25, p. 575, 1. 1-5)

Although this distinction may be minor, it is indicative of petitioners supplying their own interpretation to the facts of this case.

Petitioners "facts" further paraphrases their own testimony about how they denied any motivation or action on their part to undermine the chief's authority and paints a picture of petitioners being loyal to the chief with a good working relationship and having no conflict

with the chief. Were this not a serious matter, petitioners ascertation of half-truths and omissions from the record and opinion from the Court would be laughable. As such, it is deplorable. The Eighth Circuit, in viewing the facts most favorable to petitioners, found that petitioners were discharged after Mallott learned from Horton "that one motive behind petitioners visit to Cole was the desire to undermine Mallott's authority. Petitioner Shands had told Horton that he had spoken with Cole to show Mallott that he (Mallott) could not get everything he wanted from the council." (Appendix A-5) Shands admitted in his testimony that he had told Horton that this was a motive (TR p. 578, 1. 1-7) This motive, as it related to the reasonableness of the chief's actions in discharging petitioners was crucial in the Eighth Circuit's application of the *Pickering* balancing test. Apparently, petitioners did not think that this was the kind of "fact" to which this Court should be exposed in determining whether or not to accept the petition. This intentional omission of what may be the most important fact in the Eighth Circuit's opinion should alert this Court to question the credibility of petitioners other statements, most of which contain no reference to the opinion or transcript from which they were gleaned.

As to petitioners statement of facts concerning the procedural due process claim (Titled "City's Official Statements to the Press,") (Petition, p. 6-8) we again defer to the Eighth Circuit's finding, again viewing the evidence in the light most favorable to petitioners, that Mallott was the only city official to make public statements directly concerning petitioners. His statement was that the reason for the dismissals "were the personnel

policy that was dealt with according to city policy" and that petitioners had been dismissed for acts of insubordination and misconduct, that they "were insubordinate to a standing order to city policy" and that they "were not insubordinate to a direct order from me." (Appendix A-16) Petitioners failure to cite any reference in either the opinion, judgment or transcript upon which their statement of facts is based makes it impossible to ascertain from where the so-called facts were based.

Respondents must however point out to the Court other blatant misrepresentations of the facts made by petitioners. In one sentence, petitioners state that Mallott, in two interviews, made various statements about Key and Holder (Petitioners Brief 7). The next sentence stated that Mallott said that the firemen had claimed and collected money for fire training meetings without doing any training (Petitioners Brief 7) implying that Mallott was accusing Key and Holder of these acts. As the Eighth Circuit found, there is nothing in the record to support the implication that Mallott was referring to Key and Holder or any other petitioner.

The most glaring misrepresentation came later in the same paragraph on page 8 of petitioner's brief. In discussing the April 18, 1989 meeting of the city council where Bob Holder objected to insinuations about audits and missing money (none of which were made as directly concerning petitioners) and where Holder requested the council to publicly clear the good names of any suggestion of dishonesty and criminal acts, petitioners state "no city official took any action but let things stand as they appeared in the press." (Petitioners Brief 8) What petitioners have failed to include in their so-called "statement

of facts" was that at the April 18, 1989 meeting, presentations were made by Holder, various members of the council and interested citizens made presentations, petitioners were represented by counsel at the hearing and the mayor allowed Attorney Bruce to question each person concerning his or her statement, thus providing complete disclosure by all parties as to what happened. (Appendix A-31). Further, another hearing was held at the request of petitioners on May 4, 1989. Again, petitioners were represented by counsel, and were allowed to question witnesses against them and make their own statements. After this meeting, and after the May 14, 1989 meeting in which the City voted not to reinstate the four men, the city released a statement to dispel rumors and misinformation concerning the discharges. The release stated that the discharged firemen had not been accused of or dismissed for any financial misdealings, illegal activities, or activities involving moral turpitude. Rather the discharges were the result of fire department personnel matters. (Appendix A-6) Again, such misstatements and half-truths bring into question the credibility of all statements made by petitioners and constitute a disservice to this Court.

## ARGUMENT: REASONS FOR DENYING THE WRIT

### I. THE PETITION RAISES NO SPECIAL OR IMPORTANT QUESTIONS, AND NO EXTREME DEPARTURES FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS THAT REQUIRE THIS COURT'S INTERVENTION.

The petition should be denied because it totally lacks any "special and important reasons" for granting it, as

required by Rule 10.1 of this Court. This case presents no new questions of law. It presents no substantial federal constitutional issue of novelty or an interpretation. As will be discussed in part II of this Argument, there is no conflict between the judgment of the Eighth Circuit for which a review is sought and the decisions of other Courts of Appeals. Nor has the Eighth Circuit in its judgment "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision," as specified in Rule 10.1(a) of this Court.

## II. THE COURT OF APPEALS' DECISION AS TO PETITIONERS FIRST AMENDED CLAIM IS NOT IN CONFLICT WITH THE DECISIONS OF A MAJORITY OF THE OTHER CIRCUIT COURTS OF APPEALS IN THAT THE COURT OF APPEALS, IN VIEWING ALL MATERIAL FACTS IN A LIGHT MOST FAVORABLE TO PETITIONERS, AND THEN APPLYING THE *PICKERING* BALANCING TEST TO THOSE FACTS, THE COURT FOUND THAT PETITIONERS SPEECH WAS NOT PROTECTED BECAUSE IT DID NOT INVOLVE A HIGH DEGREE OF PUBLIC INTEREST, THAT THE FIRE CHIEF REASONABLY BELIEVED THAT THE SPEECH WAS AN ATTEMPT TO UNDERMINE HIS AUTHORITY AND HAD LED OR WOULD LEAD TO DISRUPTION WITHIN THE DEPARTMENT AND THAT, IN THIS SITUATION, PERSONAL LOYALTY TO THE CHIEF WAS CRITICAL TO THE MANAGEMENT STRUCTURE OF THE FIRE DEPARTMENT.

Petitioners First Amendment claim is based upon their discharge as members of a volunteer fire department for speech activity. The determination of whether

petitioners speech is protected by the First Amendment requires a two step judicial inquiry. The first issue is whether the petitioners speech can be "fairly characterized as constituting speech on a matter of public concern." *Connick v. Myers*, 461 U.S. 138, 146 (1983). If the speech addresses a matter of public concern, the Court must then balance the "interests of the employee, as a citizen, in commenting upon matters of public concern in the interest of the state, as an employer, in promoting the efficiency of public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Both of these questions are questions of law for the Court. *Connick*, 461 U.S. at 148. In applying the *Connick* analysis, the Eighth Circuit determined that the issues of the purchasing of fire fighting equipment and the fire departments need to hire someone to disconnect the meters did address topics of public concern. In discussing the attempt of petitioners to interfere with the hiring of David Horton, the Court stated that they entered the realm of interfering with a government personnel decision, which is normally not a matter of public concern (Appendix A-9) and that the request to second the motion to table the hiring of Horton touched on a matter of public concern only in a tangential attenuated manner (Appendix A-9)

Having found that two components of the speech directly addressed matters of public concern and that one component tangential did, the Court then applied the *Pickering* balancing test. In applying the *Pickering* balancing test to the competing interest, the Court weighs six interrelated factors:

(1) The need for harmony in the office or workplace;

(2) Whether the governments responsibilities require a close working relationship to exist between the plaintiff and coworkers when the speech in question has caused or could cause the relationship to deteriorate;

(3) The time, manner and place of the speech;

(4) The context in which the dispute arose;

(5) The degree of public interest in the speech; and

(6) Whether the speech impeded the employees ability to perform his or her duties. *Bowman v. Pulaski County Special School District*, 723 F.2d 640, 644 (8th Cir. 1983) (citing *Connick*, 461 U.S. at 151-154). The analysis in *Pickering* must be tailored to the particular facts of each case. *McBee v. Jim Hogg County*, 730 F.2d 1009 (5th Cir. 1984). The *Pickering* balance is flexible and the weight to be given to any one factor depends upon the specific circumstances of each case. *Germann v. City of Kansas City*, 776 F.2d 761, 764 (8th Cir. 1985) (citing *Egger v. Philips*, 710 F.2d 292, 319 (7th Cir.), *cert. denied* 464 U.S. 918 (1983) *cert. denied*, 479 U.S. 813 (1986). It is unfeasible and inappropriate to set for the uniform standard, but the general guidepost of *Pickering* are to be followed. *Brasslett v. Cota*, 761 F.2d 827 (1st Cir. 1985). The Eighth Circuit in this case properly addressed all six factors of the *Pickering* test.

Petitioners maintain that the majority of circuits require a showing of actual disruption before a public employee can be discharged. The issue as to whether or not actual disruption must be shown in fully addressed by the Eighth Circuit in its analysis under the need for

harmony in the workplace factor of the *Pickering* test. In stating that evidence of actual disruption is not required in all cases, citing *Germann*, 776 F.2d at 765 the Court set forth the factors relevant to the amount of disruption that a government employee must tolerate in the *Pickering* calculus as the extent to which the speech addresses a matter of public concern, *Connick*, 461 U.S. at 152, the type of service the employer provides, *Hughes v. Whitmer*, 714 F.2d 1407, 1419 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984) and the context of the speech, *Germann*, 776 F.2d at 765.

After discussing the need of a public safety organization such as the fire department to have a more significant interest than the typical government employee in regulating the speech activities of its employees "to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence" in its ability, *Hughes*, 714 F.2d at 419 (quoting *Gasparinetti v. Kerr*, 568 F.2d 311, 315-316 (3rd Cir. 1977), *cert. denied* 436 U.S. 903 (1978), that "when lives may be at stake in the fire, an *esprit de corps* is essential to the success of a joint endeavor" *Janusaitis v. Middleberry Volunteer Fire Department*, 607 F.2d 17, 26 (2nd Cir. 1979) the Court stated that the decision to discharge by the fire chief in such a situation is entitled to judicial deference. In discussing the deference given to the chief's decision to discharge, the Court properly concluded that the chief reasonably believed that the speech was an attempt to undermine his authority and had led or would lead to disruption in the department (Appendix A-12) The Court noted (1) petitioners and Holder possessed the greatest potential to undermine the chief's authority as they were

the officers and ranking members of the force; (2) that before going to Councilman Cole, they never met directly with the chief to discuss their concerns but instead circumvented the chain of command; and (3) Shands statement to Horton that they had gone to Councilman Cole because they wanted to show Mallott "that he (Mallott) could not have his way about every little thing." (Appendix A-12). Considering these factors, it became obvious that there was a serious personnel problem and that petitioners were attempting to undermine the authority of the chief. To wait for the authority of the chief to be completely undermined and the fire department actually disrupted, would destroy the efficient operation of the department to the detriment of the public. As is stated in *Connick*, it is not necessary for an employer to allow events to unfold to the extent that the destruction of the office and the destruction of working relationships is manifest before taking action. *Connick* at page 149. To state the obvious, had petitioners been successful in undermining the chief's authority with the City Council this could have had no other result than to destroy his ability to effectively lead and discipline the men under him, which included petitioners, thus destroying the working relationship between the chief and the department necessary for the efficient operation of the department. It must further be remembered that the *Pickering* test is truly a balancing test, with employment disruption being only weights on the scales. *Porter v. Califano*, 592 F.2d 770 (5th Cir. 1979).

It is further noted by the Court in its *Pickering* analysis that in a volunteer fire department like Kennett's, where a fire chief does not closely supervise those under

his command, personal loyalty to the chief is critical to the management structure of the fire department (Appendix A-13).

The cases cited by petitioner to support their claim of a conflict between the circuits on this issue are not supportive. All of the cases cited involve speech which the Courts noted as being of **substantial** public interest and that there was absolutely no showing of disruption, or perceived disruption, and in all of the cases, the issue of actual disruption was but one of the factors considered by those Courts in applying the *Pickering* analysis. In none of the cases cited by petitioners did the Courts rely solely upon the issue of actual disruption in reaching their decision. Rather, the decision was reached only after full discussion of the *Pickering* balancing factors and, only then, did the Courts determine that the public interest of the speech outweighed the other differing factors.

The Court in the case at bar determined that whatever level of public interest was contained in the petitioners speech, that level was far outweighed by the other *Pickering* factors. (Appendix A-15). Petitioners in their argument in trying to raise the speech activity to a level of substantial public interest discuss only the safety issues. At no time do they discuss petitioners attempts to undermine the authority of the chief and totally ignore petitioners stated reasons for going to Cole in order to show Mallott that he could not get everything he wanted from the council. As has been discussed in applying the *Pickering* test, all of the circumstances concerning the speech must be considered, including the context of the speech. Petitioners want to discuss, and want this Court only to consider, carefully picked out circumstances

which favor petitioners as if the safety issues were the only issues about which petitioners spoke. It should be noted that petitioners were discharged only after Mallott learned of Shands statement to Horton and the City Council found that attempt to interfere with the hiring of Horton constituted sufficient basis for the discharge (Appendix A-6). In its *Pickering* analysis, the Eighth Circuit cited the manner in which petitioners spoke, the context of the speech in view of the history of the hiring of Mallott and petitioners stated motive to undermine the authority of Mallott, none of which rise to the level of substantial public interest. Petitioners attempt to create a conflict among the circuits by choosing only one factor of the *Pickering* balancing test should fail. It should be noted that at no time, in discussing the law of this case, did petitioners even mention *Pickering* or the factors to be weighed in the *Pickering* analysis.

## III. THE COURT OF APPEALS DID NOT ERR IN FINDING AGAINST PETITIONERS ON THEIR FOURTEENTH AMENDMENT DUE PROCESS CLAIM IN THAT THE STATEMENTS MADE BY RESPONDENTS TO THE PRESS WERE NOT MADE IN CONNECTION WITH RESPONDENTS DISCHARGE AND DID NOT SERIOUSLY STIGMATIZE THEM AND WHERE A NAME CLEARING HEARING WAS PROVIDED PETITIONERS AND PETITIONERS' NAMES WERE CLEARED.

In their petition concerning their Fourteenth Amendment Due Process claim, petitioners boldly state that there was ample evidence to support the jury verdict and that the Eighth Circuit's decision was in conflict with the

decisions of this Court. Since petitioners fail to refer the Court to any portion of the record where this "ample evidence" may be found it is impossible to ascertain as to what evidence they refer. The Eighth Circuit reviewed the record and found that the only public statements made directly concerning petitioners was Mallott's statements that petitioners were discharged because they were insubordinate to a standing order to city policy (Appendix A-16). The Court correctly applied the decision of this Court in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) that these statements, and the statements actually made to Linda Redeffer, were not statements which were allegedly untrue charges that would stigmatize them as to seriously damage their associations in their community, or foreclose their freedom to take advantage of other employment opportunities. Citing *Roth*, supra, *Paul v. Davis*, 424 U.S. 693 (1976), *Bishop v. Wood*, 426 U.S. 341 (1976) and *Codd v. Vegler*, 429 U.S. 624 (1977).

In any event, even if some of the statements might be considered stigmatizing, which they weren't, all that was required was that the city provide notice and an opportunity to be heard. *Roth*, supra. This was done. Respondents were given written notice of their discharge and the reasons. They were afforded a public opportunity at a City Council meeting to refute the charges against them on April 18, 1989. A second hearing was held on May 4, 1989. In both instances, petitioners were allowed to make their own statements, were represented by counsel and were allowed to question witnesses against them. The city even released a statement stating that petitioners had

not been accused or dismissed for any financial misdealings, illegal activities, or activities involving moral turpitude.

## CONCLUSION

For the reasons set forth above, respondents state that the decision of the Eighth Circuit does not create, or resolve, any conflict with the decisions of this Court or the other Circuits and that petitioners petition be denied.

Respectfully submitted,

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